Armstrong Machine Company, Inc. *and* United Food and Commercial Workers Union, Local 6, AFL–CIO, CLC. Cases 18–CA–16276–1, 18–CA–16555-1, and 18–RC–16904

December 16, 2004

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On March 7, 2003, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that Donald Meier was not a supervisor within the meaning of Section 2(11) of the Act, and, accordingly, recommended overruling the challenge to his ballot. We agree.[3]

Meier, the Respondent's job repair foreman, was the most senior of approximately 11 employees who worked in the Respondent's repair department. Meier performed work similar to that done by others in the department, but also was responsible for ensuring that the other employees remained productive. To this end, Meier answered employees' questions and assigned departmental work. In making work assignments, Meier referred and adhered to a priority list generated by management. He also took into account employees' skills and experience and whether employees were compatible to work together. In addition, when the Respondent's owner, Clifford Porter, was absent, Meier answered customer inquiries related to the repair department.

On these facts, we agree with the judge that the Respondent failed to sustain its burden of establishing Meier's supervisory status.[4] As noted by the judge, the record fails to demonstrate that Meier exercised independent judgment in assigning work or in addressing personnel problems.[5] Further, while the record establishes that Meier discussed mechanical and repair prob-

[1] The General Counsel, Respondent, and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the judge's recommendation to sustain the challenge to the ballot of Maxine Lange. In addition, no exceptions were filed to the judge's findings that (1) the Respondent violated Sec. 8(a)(1) by threatening that union representation would be futile and that it would not sign a collective-bargaining agreement if the Union won the election; and (2) the Respondent did not violate Sec. 8(a)(1) by: creating the impression of surveillance; interrogating employee Randall Boles about his union activity or threatening him that union representation would be futile or would result in the loss of jobs; threatening to reduce or eliminate employee bonuses; threatening employees with reduced vacation or job flexibility; threatening employees with loss of benefits; and intimidating and harassing employees because of their union support by approaching them with a video camera and asking the name of their supervisor.

In adopting the judge's finding that employee Jim Lange quit his employment and was therefore not discharged in violation of Sec. 8(a)(3) and (1), we observe that the Union stated in its brief in support of its cross-exceptions that it was not contending that the Respondent's admission in its answer to the complaint that Jim Lange was discharged precluded the Respondent from arguing that Lange quit his employment. Accordingly, the issue of whether that admission in the answer is dispositive is not before us.

[2] We shall modify the judge's recommended Order to conform more closely to the findings herein, including adding a remedy to reflect the judge's finding that the Respondent unlawfully threatened to reduce employees' hours because of union activity. We shall also modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). We shall also issue a new notice to conform to the language in the Order.

[3] For the reasons set forth in his partial dissent, Chairman Battista finds, contrary to the judge and his colleagues, that Meier is a Sec. 2(11) supervisor.

[4] It is well settled that the burden of establishing supervisory status rests on the party asserting it. "Thus, any lack of evidence in the record is construed against the party asserting supervisory status." *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Conclusionary evidence is insufficient to prove supervisory status. *Chevron Shipping Co*., 317 NLRB 379, 381 fn. 6 (1995) (citing *Sears, Roebuck & Co*., 304 NLRB 193, 199 (1991) ("[C]onclusionary statements, without supporting evidence, are not sufficient to establish supervisory authority.")); *North Shores Weeklies, Inc*., 317 NLRB 1128 (1995) (noting the employer's failure to meet its burden where "the record does not reveal the press supervisors' particular acts and judgments that make up their direction of work."). Further, giving "some instructions or minor orders to other employees," does not confer supervisory status. *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002). Only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp*, 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). The Board has a duty not to construe supervisory status broadly because "the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." Id. at 1689.

[5] See, e.g., *Dynamic Science, Inc*., 334 NLRB 391, 393 (2001) ("Conclusory evidence, 'without specific explanation that the [disputed person or classification] in fact exercised independent judgment,' does not establish supervisory authority.") (citations omitted).

lems with customers, it fails to establish that his problem-solving authority could affect employees' terms and conditions of employment.[6]

Our dissenting colleague contends that Meier's supervisory authority is established by the fact that, when assigning work, Meier considers the employees' skills, experience, and compatibility. We disagree. Nothing in the record supports a finding that Meier's employee placements are based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together. In other words, the record fails to evince that Meier's assignment of work was anything other than routine.[7]

In *Hausner-Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998), the Board found that supervisory status was not established with respect to three employees who attended daily meetings at which management created a production list. These employees who, upon returning to their departments, used the production list to indicate the priority of particular projects to department employees, were viewed as mere conduits of management's decisions. Further, as to one of these three employees who made assignments by taking note of employees' skill and experience, the Board found that he did not exercise independent judgment as required under Section 2(11); rather, he assigned work in the manner of a skilled leadman.

The record here shows that Meier made work assignments in a manner similar to those involved in *Hausner*, i.e., by referring to a production list and taking note of employees' skills and experience with respect to a particular task. As noted above, such evidence, without more, does not establish that the assignments were anything other than routine.[8] Further, Meier's taking note of employee compatibility when assigning work does not demonstrate the exercise of independent judgment as envisioned by Section 2(11) of the Act. See, e.g., *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994). Accordingly, we adopt the judge's finding that Meier is not a supervisor within the meaning of Section 2(11).

2. The judge found that the Respondent violated Section 8(a)(1) of the Act by certain statements made by the Respondent's president and partial owner, Clifford Porter, during a meeting on November 23, 2001. Specifically, the judge found that Porter unlawfully interrogated employees about their union activities, threatened plant closure if the employees selected a union to represent them, and told employees that union representation would be futile and that he would not enter into a collective-bargaining agreement with the Union. The judge further found, however, that certain other comments Porter made were not violative of Section 8(a)(1), because they did not amount to unlawful threats of suspension and discharge, as was alleged. For the reasons set forth below, we find, contrary to the judge, that these statements violate Section 8(a)(1) of the Act.

On November 23, 2001, Porter met with Calvin Lange[9] and employees Donald Meier and Jamie Lange in a work area in the Respondent's facility. During this meeting, Porter raised numerous concerns, including concerns about oil spills on the production floor, the poor productivity of certain employees, excessive socialization between employees during working time, a recent OSHA inspection, and employees' problems with Michelle Clark-Ames, Porter's daughter and partial owner of the Respondent. Porter also expressed concern about a statement Calvin Lange made to employee John Lyon, in early November, threatening Lyon with a "blanket party" if he did not support and vote for the Union. (As explained by the judge, a "blanket party" is slang for the physical assault of an individual while the victim's head is covered with a blanket so as to prevent him from defending himself.)

Interspersed among the lawful topics of discussion, Porter also made other statements during this November 23 meeting that the judge correctly found violated Section 8(a)(1). Porter interrogated the employees, asking, "so what are you hearing about who is pushing this Union thing," and "who is pushing this Union thing? You guys don't know anything about that either, huh?" In addition, Porter unlawfully told the employees that he could close the plant because of the employees' union

[6] *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988) (leadmen lack supervisory authority where they function as quality control employees in inspecting the work of others, report performance issues to their supervisors, and have no authority to effectuate any ultimate personnel decisions).

[7] See *Quadrex Environmental Co.*, 308 NLRB 101 (1992) (field service employees designated as "leads" not statutory supervisors where "the leads' assignment of tasks to work crew employees demonstrates nothing more than the knowledge expected of experienced persons regarding which employees can best perform particular tasks."); *Hexacomb Corp.*, 313 NLRB 983, 984 (1994) (foremen not found to be supervisors where there was no evidence that they exercised independent judgment "when they shift[ed] employees around within their respective lines to get projects accomplished.").

[8] See, e.g., *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001) (employee found not to be a supervisor where there was no evidence that he exercised any authority "beyond routine direction of simple tasks or the issuance of low level orders."); *Chrome Deposit Corp.*, 323 NLRB 961, 963–964 (1997) (crew leaders who made "routine" work assignments based on parameters defined by management found not to be supervisors because they possessed "the kind of routine, decision-making authority typical of non-supervisory leadmen").

[9] We agree with the judge's finding that Calvin Lange is a Sec. 2(11) supervisor.

activities. Porter admitted that he told the employees that he could "get rid of most of these people here and just dwindle their jobs down . . . job everything out . . . I mean if you're gonna try to put the Union on me . . . why that ain't gonna work too good either." Porter further admitted that he told Lange, Meier, and Lange that he was "almost 70 years old and [could] close this goddamn place and sell it out . . . ." Porter also told the employees that union representation would be futile, and that he would not enter into a collective-bargaining agreement with the Union. Porter stated, "[w]ell, you guys thin[k] that the Union is going to run this place it ain't going to happen . . . And, if the Union gets in here . . . I won't give the Union a contract at all . . . I'll just job the stuff out."

In addition to these threats, Porter complained several times during the course of the meeting about the "bad attitudes" of the Langes and Meier, and stated that he was "tired of this bullshit." Porter repeatedly suggested that the employees take time off to "think about what you are doing right now," thereby allowing Porter to get "this whole goddamn thing straightened out." Porter also stated the following:

> I'm tired of it . . . if you guys don't want to work here . . . leave . . . you could leave . . . that's one nice thing about the old USA, you can quit and leave any time you want to. See, I'm [ ] tired of this bullshit. See, I had another guy working here one time and he tried the same shit, ya know. You know who it was . . . it was Mark . . . he was going around trying to intimidate people too . . . I got rid of him, forever . . .

Porter reiterated this theme several times. He stated, "[b]ut if you guys don't want to work here why hell, just go somewhere else . . Every time I come over here you guys are in a little huddle . . plotting against the rest of the people that work here." Later in the conversation Porter stated, "I can close the door ya know . . . one of you guys made the statement that if you get the Union in here why I won't be able to close the door."

At the hearing, Porter acknowledged that he was upset because the employees supported the Union, and that the "attitude" he objected to was the employees' union support.

While finding that several of Porter's statements during the November 23 conversation violated Section 8(a)(1), the judge dismissed allegations that Porter further violated the Act by threatening the employees with suspension and discharge. Regarding the threat of suspension, the judge found that Porter, when stating that employees had "bad attitudes," was referring to the employees' lack of commitment to correcting workplace problems, the intimidation of Lyon, the disregard of their job responsibilities, and the criticism of Clark-Ames. The judge, therefore, found that Porter had threatened suspension for unprotected, rather than union, activity. Similarly, as to the threat of discharge, the judge found that the General Counsel failed to prove that the threat pertained to the Union or the organizing campaign. The judge further found that the General Counsel did not prove that employees would reasonably understand the threat to be related to the employees' protected activity.

In their exceptions, the General Counsel and the Charging Party argue that, when taken in context, Porter's use of "bad attitude" is synonymous with union activity and that Porter, through his repeated suggestions that the employees take a couple of weeks off because of their "bad attitudes," implicitly threatened the employees with suspension for engaging in union activity. As to the threat of discharge, the General Counsel and Charging Party argue that the Respondent's statements, when viewed together, constitute a clear threat to terminate the Langes and Meier because of their union activity. We agree.

Contrary to the judge, we find that Porter's statements constituted unlawful threats of discharge and suspension. In dismissing these additional allegations, the judge improperly isolated the statements from the coercive context in which they were uttered. When these statements are analyzed in the context of the entire November 23 conversation, it is clear that Porter threatened employees with suspension and discharge because of their union activity.

Although Porter, during the course of the meeting, discussed many topics and articulated the numerous reasons why he was upset with the employees, he, sua sponte, raised the topic of the Union. By engaging in unlawful interrogation, by his threats of plant closure, and by his statements conveying a sense of futility and a refusal to enter into a collective-bargaining agreement, Porter made clear to the employees that he was upset about the employees' union support. Given the rambling nature of the conversation, and the numerous unlawful statements referring to the Union, employees could reasonably believe that the threats of suspension and discharge were also related to the employees' union support. In this context, employees would not easily discern that Porter's repeated references to the employees' "bad attitudes" were unrelated to the employees' union activity. See *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998) ("[t]he Board has repeatedly found, with court approval, that, in a labor-relations context, company complaints about a 'bad attitude' are often euphemisms for pro-union sentiments").

In fact, as discussed above, Porter admitted in his testimony that the "attitude" he was upset about related, at least in part, to the employees' union support. Even if the discharge threat was actually related to the intimidation and threatening of Lyon, and even if Porter was not "focusing on union sympathies" when he referred to employees' "bad attitude," employees could reasonably construe the threats of discharge and suspension as statements relating at least in part to the employees' union activities. In light of this ambiguity, the threats of suspension and discharge would have the reasonable tendency to coerce the employees in the exercise of their Section 7 rights. Accordingly, the threats of suspension and discharge made by Porter on November 23 violated Section 8(a)(1) of the Act. See *Furniture Renters of America, Inc.*, 311 NLRB 749, 752 (1993), enfd. In part 36 F. 3d 1240 (3d Cir. 1994)(employer's statements violate Section 8(a)(1) of the Act where such statements could have reasonably led employees to believe that support of the union could lead to discharge).

3. The judge found that the Respondent did not violate Section 8(a)(1) of the Act when Porter said to Calvin Lange, Donald Meier, and Jamie Lange that they could not vote in the election because they were supervisors. We agree.[10]

The record establishes that, during the November 23 meeting, Porter told Lange, Meier, and Lange that, because they were supervisors, they were not eligible to vote in the election. Porter showed the men a document that stated that "managers and supervisors" cannot vote in representation elections. One of the men protested, stating that they were not supervisors. Porter again articulated his belief that they were supervisors, to which one of the men replied that they had never been told that they were supervisors. In response, Porter said,

> "[s]ee, we're going to have a hearing about this . . . so we'll find out," and further stated, " . . . you guys might want to just take off for a couple of weeks until I get ahold [sic] of a lawyer and get this all straightened out." Notwithstanding Porter's suggestion, the Respondent did not lay the men off, nor did they take time off.

In finding that Porter's comments did not violate Section 8(a)(1), the judge distinguished Porter's comments from those found unlawful in *Shelby Memorial Home*, 305 NLRB 910, 918–919 (1991). The judge stated that, whereas the employer in *Shelby* clearly and unequivocally informed employees that they were supervisors and were not entitled to participate in protected activity, Porter did not insist that the men were supervisors and instead stated that the dispute would be resolved through a hearing. The judge further stated that Porter did not tell the three men that they had no right to engage in protected activity. The judge found that, because Porter's statements merely communicated his opinion and were not coercive or threatening, they did not interfere with the employees' exercise of their Section 7 rights.

We agree with the judge's finding. It is well settled that the Act does not preclude an employer from expressing opinions to employees, so long as those statements are not coercive. See e.g. *Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978). Because, as the judge found, Porter's statements amounted to the mere expression of his opinion, the issue is whether these statements could reasonably tend to coerce and intimidate the employees in the exercise of their Section 7 rights. We agree with the judge that they could not. As the judge articulated, Porter expressed his opinion, the men disagreed, and Porter responded that the dispute would be resolved through a hearing. As such, Porter's benign expression of opinion would not reasonably tend to intimidate or coerce employees in the exercise of their protected activity.

Our dissenting colleague does not dispute that Porter merely suggested that the three men might be supervisors. However, relying on *Shelby Memorial Home*, he contends that this suggestion is sufficient to establish a violation. Contrary to our colleague, *Shelby* does not hold that the mere suggestion that an employee may be a supervisor amounts to a per se violation of Section 8(a)(1). In *Shelby*, the employer did not *suggest* the employees were supervisors; rather, the employer *insisted* that employees were supervisors, *demanded* that employees refrain from engaging in protected activity, and *threatened* termination if the employees did engage in such activity. *Shelby*, supra, 305 NLRB at 919. In contrast, Porter's comments did not contain such harsh and threatening statements. Rather, they amounted to the mere expression of his opinion followed by a statement that the issue would be resolved with a hearing. Thus, contrary to the dissent's contention, Porter did not act at his "peril" as did the employer in *Shelby*. Porter's expression of his opinion about their supervisory status did not include any prohibitions, demands, or threats, like the statements at issue in *Shelby*. To the contrary, Porter's comments were accompanied by the assurance of a fair resolution of their difference of opinion, i.e., at a hearing. We agree with our colleague that if an employer flatly tells persons that they cannot vote, the employer has acted at its peril and has violated Section 8(a)(1) if it turns out that the persons are employees. However, the Respondent here (through Porter) simply told persons

[10] For the reasons set forth in his partial dissent, Member Walsh finds that this statement violated Sec. 8(a)(1).

that, in its opinion, they were ineligible and that the issue would be resolved in a hearing. The individuals would reasonably understand that they were free to take a contrary position and thereby claim the status of eligible employees.

Finally, the fact that Porter committed 8(a)(1) violations in the same speech does not render unlawful the comments discussed above. The employees would reasonably understand that their eligibility would be determined solely by the facts and law developed at a hearing.

Our colleague's reliance on *Medcare Associates, Inc.*, 330 NLRB 935, 936 fn. 7, 968 fn. 44 (2000), and *Sav-On Drugs*, 253 NLRB 816, 820–821 (1980), enfd. 728 F.2d 1254 (9th Cir. 1984) is misplaced. In *Medcare Associates*, an employer told a group of RNs, who were later found not to be supervisors, that they were "prohibited" from engaging in union activity. The coercive nature of that statement of prohibition is not comparable to Porter's expression of his opinion about supervisory status and his statement that the issue would be resolved with a hearing. In addition, Porter simply said that, in his opinion, the employees would be ineligible to vote. In *Medcare*, the employees were told that all union activity was prohibited. *Sav-On Drugs* involved the termination of two employees for engaging in protected activity, conduct far more coercive than the conduct at issue here. Thus, in contrast to those two cases, our colleague misses the point that the statements at issue here did not have a chilling tendency.

For these reasons, we adopt the judge's finding that Porter's statements did not violate Section 8(a)(1).

4. The judge found that the Respondent violated Section 8(a)(3) of the Act by terminating employees Jamie Lange and Donald Meier because of their union activity. We affirm the judge's finding that the General Counsel sustained his burden, under *Wright Line*,[11] of demonstrating that the employees' union activities were a motivating factor in the Respondent's decision to terminate them. However, as explained below, we find, contrary to the judge, that the Respondent met its burden of establishing that it would have discharged the two employees even if they had not engaged in union activities. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(3) of the Act by terminating Jamie Lange and Donald Meier.[12]

The Respondent terminated Calvin Lange,[13] Jamie Lange, and Donald Meier on December 24, 2001. The events leading to their terminations began in early November 2001, when the three of them threatened employee John Lyon with a "blanket party" if he did not vote for the Union. (As explained above, a "blanket party" is slang for the physical assault of an individual while the victim's head is covered with a blanket so as to prevent him from defending himself.) The Respondent's owner, Clifford Porter, learned of this threat approximately 2-1/2 weeks after it was made. Porter approached Calvin and Jamie Lange, and Meier the day he learned of the threat and demanded that they stop threatening employees.

Immediately thereafter, the two Langes and Meier drove to Lyon's home, where they were informed by Lyon's wife that Lyon was attending to personal business at a local shop. They proceeded to that shop where they approached Lyon and informed him that, as a result of Lyon's disclosure of the "blanket party" threat, Calvin Lange had been terminated. In fact, Calvin Lange had not been terminated. Upon learning that the two Langes and Meier had approached Lyon again, and had referenced their prior discussion, Porter telephoned his attorney, who advised him not to terminate the employees until after the election.

Shortly after the December 13, 2001 election, Calvin Lange, together with Jamie Lange and Donald Meier, informed Porter that they had brought the Union in to "punish" Porter's daughter and co-owner, Michelle Clark-Ames. Thereafter, on December 24, 2001, the Respondent terminated Calvin Lange, Jamie Lange, and Donald Meier. At the hearing, Porter acknowledged that Lange's postelection statement was one of the reasons for his decision to terminate the three, but added that the primary reason was their "terrorization" of another employee (i.e., Lyon).

Although we agree with the judge that Porter's testimony establishes that Lange and Meier's protected activity was a motivating factor in the Respondent's decision to terminate them, we find, contrary to the judge, that the record also shows that the Respondent would have terminated Lange and Meier even in the absence of their protected activity. The "blanket party" statement threatened physical violence. In response, the Respondent directed the men to stay away from Lyon. Lange and Meier willfully disregarded this directive; they *immediately* proceeded to track Lyon down to falsely inform

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] Chairman Battista finds that Donald Meier is a Sec. 2(11) supervisor. Assuming arguendo that Meier is an employee, Chairman Battista joins the following analysis as it pertains to the issue of termination.

[13] As stated, supra, we adopt the judge's finding, for the reasons cited in his decision, that Calvin Lange was a supervisor within the meaning of the Act, and that his termination was, therefore, not unlawful.

him that he had caused the Respondent to terminate Calvin Lange. It was this conduct—the unprotected threat and the immediate and willful disregard of the Respondent's directive—that led Porter to decide that Lange and Meier should be terminated.

This decision was made in late November. There is no evidence that Porter ever changed his mind. Upon the advice of his attorney, however, Porter waited until shortly after the election to terminate Lange and Meier. In the period between Porter's decision and the actual termination, Porter learned that the men asserted that they brought the Union in to punish Clarke-Ames. Porter admitted that this became a secondary reason for the terminations. However, the decision to terminate the men had already been made, and that decision had not been based on the employees' protected activity. The fact that the employees subsequently made a prounion statement does not change the fact that a lawful decision to terminate had been made, and does not require that this lawful decision be revoked.

Accordingly, we find that that the discharges do not violate Section 8(a)(3) of the Act.

5. We adopt the judge's recommendation to overrule the Respondent's objection to the election, which alleges that Donald Meier, Jamie Lange, and Calvin Lange threatened unit employees with physical harm and difficult working conditions if the employees did not vote in favor of the Union. The Respondent relies on the "blanket party" statement made by Calvin Lange to employee John Lyon, as well as the November 23 after-hours contact by Calvin Lange, Jamie Lange, and Donald Meier with Lyon, when they falsely told Lyon that Calvin Lange had been terminated as a result of Lyon's disclosure of the "blanket party" threat. The judge found, and we agree for the reasons set forth in the judge's decision, that the "blanket party" statement was not objectionable. The judge, however, did not discuss the November 23 incident.

In its exceptions, the Respondent contends that the judge erred in failing to consider the subsequent, afterwork visit, arguing that this visit constituted objectionable conduct sufficient to warrant setting aside the election. We find the Respondent's argument without merit. The subsequent visit, when considered either alone or together with the previous "blanket party" statement, is insufficient to create a general atmosphere of fear and reprisal and, therefore, does not warrant setting aside the election. Id.

DIRECTION

It is directed that the Regional Director for Region 18 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Donald Meier and Jamie Lange. The Regional Director shall thereafter serve on the parties a revised tally of ballots and issue the appropriate certification.

ORDER

The Respondent, Armstrong Machine Company, Pocahontas, Iowa, its officers, agents, successors, and assigns shall

Cease and desist from

(a) Threatening its employees with a reduction in hours because of its employees' activities on behalf of a labor organization.

(b) Unlawfully interrogating its employees about their union activities or the union activities of other employees.

(c) Threatening employees with discharge or suspension because of their activities on behalf of a labor organization.

(d) Threatening its employees that choosing a union would be futile.

(e) Threatening its employees that it would not sign a collective-bargaining agreement with a union selected by its employees.

(f) Threatening its employees that it could close the plant if its employees select a union to represent them.

(g) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facility in Pocahontas, Iowa, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 23, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2004

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I find that Donald Meier is a statutory supervisor, that the challenge to his ballot should be sustained, and that his termination did not violate Section 8(a)(3).[1]

The record establishes that Meier's responsibilities include assigning departmental work to employees. In making these assignments, Meier considers the employees' skills and experience, and decides which employees will work well together on specific projects. Although Meier refers to a management-generated list when assigning work, this list merely indicates the projects designated for completion. It is often Meier alone who determines which employees are best suited to work on specific assignments.

In sum, Meier assesses employee skills, he matches these skills to particular projects, and he makes a determination that certain employees will work well together. In my view, these are quintessentially matters of discretion and judgment. There is no guideline or book that dictates to Meier the assignment that he is to make.

My colleagues contend that the record shows nothing more than Meier's reliance on the "common knowledge" of employees' skills and experience, and of their ability to work together. However, there is no record evidence establishing the existence of any such "common knowledge."

The cases my colleagues cite in support, *Quadrex Environmental Co.*, 308 NLRB 101 (1992); and *Hexacomb Corp*., 313 NLRB 983, 984 (1994), are clearly distinguishable. In *Quadrex*, the "leads" were found not to be supervisors, in part, because their staffing assignments were carried out "under the direction of management according to a schedule that has been established by management." Id. Indeed, if the leads encountered any problems, they were required to report them. Id. Here, there is no evidence suggesting that Meier's authority to assign work is qualified by a directive to report any problems to his superior. Meier's authority in this respect was unqualified. Similarly, in *Hexacomb*, supra, the Board found the assignments made by certain foremen did not establish supervisory status because the record failed to show that they exercised "independent judgment when they shift employees around within their respective lines to get projects accomplished." Id. By contrast, there is such evidence here. The record shows that the assignments involved an assessment of employee skills and a determination of which employees would work well together on a particular project.

My colleagues further contend that Meier's responsibilities are akin to those found insufficient to establish supervisory status in *Hausner Hard-Chrome*, 326 NLRB 426 (1998). That case too is clearly distinguishable. In *Hausner*, management "laid out the work for the day" and the alleged supervisors, possessing no control over plant operations, merely communicated these plans to the employees. In other words, there were no specific assignments that required independent judgment. Such is not the case here. Meier assigns work, and, in doing so, regularly exercises independent judgment sufficient to satisfy the requirements of Section 2(11). Further, there was no evidence in *Hausner*, as there is here, that the assignments involved a determination of employees' skills, or a determination of which employees could work well together on any particular project.

For the above reason, I conclude that Meier is a supervisor.[2]

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

My colleagues find, and I agree, that the Respondent's president and partial owner, Clifford Porter, violated Section 8(a)(1) of the Act by certain statements he made during a meeting on November 23, 2001 with supervisor Calvin Lange and employees Jamie Lange and Donald Meier.[1] Specifically, at that meeting Porter unlawfully interrogated the employees concerning their union activities, threatened plant closure if the employees selected a union to represent them, told the employees that union representation would be futile and he would not enter into a collective-bargaining agreement with the Union, and threatened to suspend and terminate the employees for engaging in union activity. During the course of the

[1] I agree with the majority's findings in all other respects.

[2] Even if Meier were an employee, his discharge would be lawful, for the same reason that my colleagues and I find that Jamie Lange's discharge was lawful.

[1] I agree with my colleagues that Calvin Lange was a supervisor under Sec. 2(11) of the Act. I join Member Liebman in finding that employees Donald Meier and Jamie Lange were not statutory supervisors.

conversation, Porter also told statutory employees Meier and Lange that they would not be able to vote in the election because they were supervisors. My colleagues find that statement to be lawful, arguing that Porter was merely tentatively stating his honest belief that those employees were supervisors and, therefore, ineligible to vote. In finding this statement to be lawful, my colleagues have improperly isolated the statement from the coercive and unlawful context in which it was made. When analyzed in the context of the entire November 23 conversation, it is clear that Porter committed an additional violation of Section 8(a)(1) of the Act.

During the course of the November 23, 2001 meeting described in the majority opinion, Porter threatened the employees that, because they were supervisors, they would not be allowed to vote in the election. When the employees insisted that they were not supervisors, Porter responded, "[w]ell I thought you [were]." One employee stated that he was never informed that he was a supervisor and Porter replied that "we're going to have a hearing about this . . . [s]o we'll find out," and then told the employees that he thought they ought to take a couple of weeks off "until I get hold of a lawyer and get this all straightened out."

The General Counsel and the Charging Party contend that this statement is unlawful even if it reflected Porter's honest belief because, under *Shelby Memorial Home*, 305 NLRB 910 fn. 2, 912, 918–919 (1991), enfd. 1 F.3d 550 (7th Cir. 1993), "[a]n employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act." Because Jamie Lange and Meier have been found not to be supervisors, the Respondent interfered with the exercise of the employees' Section 7 rights.

Porter's comments were unlawful under *Shelby Memorial Home*. A statement that an employee is ineligible to vote would reasonably chill that employee in the exercise of his Section 7 right to vote if the employee is actually eligible. The fact that Porter did not insist that the employees would be ineligible to vote and stated that they would "find out," does not erase the coerciveness of the statement, particularly in light of Porter's continued insistence that the employees were supervisors. Under *Shelby Memorial Home*, Porter acted at his peril when he suggested that the employees would be ineligible to vote.

My colleagues attempt to distinguish *Shelby Memorial Home*, supra, on the basis that in *Shelby*, the employer did more than merely suggest that the employees were supervisors and would therefore be ineligible to vote, but also demanded that employees refrain from engaging in protected activity and threatened termination if the employees engaged in such activity. In *Shelby*, the Board found, inter alia, that the respondent violated Section 8(a)(1) by (a) telling employees that they could not vote in a union election; (b) telling employees that they could not participate in union activities and that they would be subject to dismissal for doing so; and (c) telling employees that they could be discharged for disloyalty for engaging in union activities. In distinguishing *Shelby* on the basis of the demand to refrain from union activity and the discharge threats, my colleagues suggest that absent such "harsh and threatening" conduct, merely telling eligible employees that they could not vote in an election would not constitute a violation of Section 8(a)(1).

Contrary to my colleagues, I do not read *Shelby* to preclude a finding that a statement to eligible employees that they would not be able to vote in the election, without more, can violate Section 8(a)(1). *Shelby* set forth and applied the rule that an employer acts at its peril if it chills the exercise of the Section 7 rights of anyone who may later be found to be protected by the Act. *Sav-On Drugs*, 253 NLRB 816, 820–821 (1980), enfd. 728 F.2d 1254 (9th Cir. 1984). Thus, under the "peril" rule, violations of the Act are established if employees are later found to be statutory employees and steps had been taken to chill their Section 7 rights. See, e.g., *Medcare Associates, Inc*., 330 NLRB 935, 936 fn. 7, 968 fn. 44 (2000) (erroneously telling a group of RNs that they were supervisors and were therefore prohibited from engaging in union activity violated Sec. 8(a)(1) where RNs were later found not to be supervisors). Nothing in the "peril" rule requires additional coercion if employees' Section 7 rights are chilled. My colleagues apparently believe that merely telling eligible employees that they are ineligible to vote does not chill them in the exercise of Section 7 rights. However, suggesting that an eligible employee is ineligible has the reasonable tendency to discourage that employee from exercising his statutory right to vote. Because we have found that Lange and Meier were statutory employees entitled to vote in the election, the Respondent acted at its peril when it attempted to discourage those employees from voting in the election, and, under *Shelby*, committed a violation of Section 8(a)(1) of the Act.[2]

Although Porter may have believed that Lange and Meier were statutory supervisors at the time he suggested

[2] My colleagues distinguish *Sav-On Drugs* and *Medcare* on the basis that the conduct in those cases was "hardly comparable to" or "far more coercive than" the conduct at issue here. Even if the conduct at issue here was comparatively less coercive, that does not preclude a finding that the conduct is coercive nevertheless. If, as here, a statement reasonably discourages employees from exercising their Sec. 7 rights, it is coercive and violative of Sec. 8(a)(1).

that they would be ineligible to vote, under the "peril" rule, even an honest belief does not insulate the conduct from being found coercive. Whether a statement is coercive within the meaning of Section 8(a)(1) of the Act, after all, is measured from the perspective of the employee, and thus is not based on the state of mind of the employer. See *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105–106 (6th Cir. 1987).

My colleagues' citation to *Wilker Bros.*, 236 NLRB 1371, 1372 (1978), enfd. in part 652 F.2d 660 (6th Cir. 1981), for the proposition that an employer may express opinions to employees so long as those statements are not coercive, is unavailing. Here, Porter's expression of his "opinion" that statutory employees Lange and Meier were ineligible to vote in the election was coercive because it had the reasonable tendency to discourage them from voting, thereby chilling those employees in the exercise of their statutory right to vote.[3] Accordingly, Porter's comment violated Section 8(a)(1) of the Act.

Dated, Washington, D.C. December 16, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten our employees with a reduction in hours because of their protected and union activities.

WE WILL NOT unlawfully interrogate our employees about their union or other protected activities or about the Union or protected activities of other employees.

WE WILL NOT threaten our employees with discharge or suspension because they engage in activities on behalf of a labor organization.

WE WILL NOT threaten our employees by stating that choosing a labor organization to represent them is futile.

WE WILL NOT threaten our employees that we would not sign a collective-bargaining agreement with a labor organization selected by our employees.

WE WILL NOT threaten our employees that we could close the plant if our employees selected a labor organization to represent them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ARMSTRONG EQUIPMENT COMPANY

David M. Biggar, Esq., for the General Counsel.
Peter J. Ford, Esq., for the William D. Thomas, Esq. (Davis, Brown, Koehn, Shors & Roberts), for the Respondent.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. This proceeding concerns two unfair labor practice cases, 18–CA–16276–1 and 18–CA–16555–1, which were consolidated for hearing with a representation case, 18–RC–16904. In the unfair labor practice cases, the General Counsel of the National Labor Relations Board (the "General Counsel" or the "government") has alleged that Armstrong Machine Company, Inc. (the "Respondent") unlawfully discharged five employees because of their union activities, and that management officials made a number of statements which interfered with, restrained and coerced employees in the exercise of rights protected by the National Labor Relations Act. I find that Respondent unlawfully discharged two employees, Jamie Lange and Donald

[3] Discouraging eligible employees from voting is, by itself, inherently coercive, regardless of the context in which such a statement is made. However, I observe that in this case the "opinion" at issue was expressed during the course of the November 23 meeting at which numerous other unlawful statements and threats were made, including threats of discharge and suspension for engaging in union activities. Although the unlawful threats of discharge and suspension were not directly linked to a future attempt by these statutory employees to vote in the election, Porter did threaten that dire consequences would ensue should the employees continue to engage in union activities. Moreover, Porter arguably linked a threat of suspension with the employees' intention to vote in the election when he immediately followed his "opinion" concerning the employees' ineligibility to vote with a suggestion that the employees take a couple of weeks off until he could "get hold of a lawyer and get this all straightened out." Under such circumstances, my colleagues' attempt to portray Porter's comments as merely a benign expression of his "opinion on a supervisory issue" is contrary to the facts. In light of Porter's hostility to union activity, a reasonable employee would likely interpret Porter's "opinion" concerning the employees' ineligibility as an attempt to discourage them from exercising their Sec. 7 right to vote in the election.

Meier Jr., but did not unlawfully discharge three other individuals, Calvin Lange, Jimmy Lange, and Brad Meier.

Issues in the representation case concern an election conducted by the Board at the Respondent's plant on December 13, 2001. The Board agent conducting that election challenged the ballots of four individuals whose names did not appear on the voter eligibility list. I recommend that two of these challenged ballots, cast by Jamie Lange and Donald Meier Jr., be opened and counted.

Additionally, I recommend that Respondent's objection to conduct affecting the results of the election be overruled. The record does not establish that the alleged objectionable conduct occurred during the critical period.

Procedural History

Respondent repairs pumps, and manufactures parts for pumps at its plant in Pocahontas, Iowa. On November 14, 2001, the Union filed a representation petition in Case 18–RC–16904. The Union and Respondent entered into a stipulated election agreement which the Regional Director for Region 18 of the Board approved on December 3, 2001. This agreement provided for an election in the following collective–bargaining unit:

> All full–time and regular part–time production and maintenance employees employed by the Employer at its plant located at 10 SW 7th Street, Pocahontas, Iowa; excluding office clerical and office cleaning employees and guards and supervisors as defined in the National Labor Relations Act.

On December 13, 2001, the Board conducted this election. At the conclusion of the election, the Board agent issued a tally of ballots which set forth the following information:

Approximate number of eligible voters	24
Void ballots	0
Votes cast for Petitioner	9
Votes cast against Petitioner	10
Number of valid votes counted	19
Challenged ballots	4
Valid votes counted plus challenged ballots	23

Challenged ballots are sufficient in number to affect the results of the election.

On December 20, 2001, Respondent filed objections to conduct affecting the results of the election.

On about December 24, 2001, Respondent discharged employees Calvin Lange, Jamie Lange, and Donald Meier, Jr. On January 3, 2002, the Union filed an unfair labor practice charge against Respondent in Case 18–CA–16276–1. The Union alleged, among other things, that these discharges violated Sections 8(a)(3) and (1) of the Act.

After an investigation, the Regional Director for Region 18 issued a complaint and notice of hearing in Case 18–CA–16276–1 on July 9, 2002.

On July 11, 2002, the Regional Director issued a report on challenged ballots and objections, order directing hearing, consolidating cases and notice of hearing. This order consolidated Case 18–CA–16276–1 with Case 18–RC–16904 and scheduled the hearing to begin on September 17, 2002.

On August 19, 2002, the Union filed an unfair labor practice charge against Respondent in Case 18–CA–16555–1. This charge alleged that on about April 3, 2002, Respondent discharged employee Brad Meier in violation of Section 8(a)(3) and (1) of the Act.

On September 3, 2002, the Regional Director issued an order consolidating cases and amendment to consolidated complaint. This order added an allegation raised by the unfair labor practice charge in Case 18–CA–16555–1. Specifically, it amended the complaint to allege that on about April 3, 2002, Respondent discharged employee Brad Meier.

On September 17, 2002, hearing opened before me in Fort Dodge, Iowa. The parties presented evidence on September 17 and 18, 2002 and September 25 and 26, 2002. Counsel also filed posthearing briefs, which I have considered.

Admitted Allegations

In its answers to the complaint and to the amendment to complaint, Respondent has admitted a number of allegations. Based on these admissions, I find that the unfair labor practice charges were filed and served as alleged in complaint paragraphs 1(a), 1(b), and 1(c). Further, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent does not contest that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on the record, and particularly noting that Respondent entered into a stipulated election agreement with the Union in Case 18–RC–16904, I so find.

Respondent has admitted that Clifford Porter, president and partial owner of Respondent, and Michelle Clark, secretary–treasurer and partial owner of Respondent, are its supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively. I so find.

Respondent has admitted the allegations raised in Complaint paragraph 6(a). Based on that admission, I find that on about December 24, 2001, Respondent discharged its employees Calvin Lange, Jamie Lange, and Donald Meier, Jr.

Respondent's answer admitted the allegations raised in complaint paragraph 6(b), that it discharged employee Jimmy Lange on about December 28, 2001. However, for reasons discussed below, I conclude that this "admission" was a typographical error. I do not find that Respondent discharged Jimmy Lange.

Respondent has admitted the allegations raised in Complaint paragraph 6(c). Based on that admission, I find that on about April 3, 2002, Respondent discharged its employee Brad Meier.

Respondent has denied the other allegations raised by the complaint, as amended.

Disputed Allegations

Supervisory Status of Calvin Lange

Respondent contends that Calvin Lange was, during his employment with Respondent, its supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act. The government disputes this allegation. Resolving this issue will determine whether the challenged ballot cast by Calvin Lange in the December 23, 2001 election should be counted.

With certain exceptions not relevant here, the Act's protection does not extend to individuals who meet Section 2(11)'s definition of supervisor. Therefore, Calvin Lange's supervisory status, of lack of it, also is relevant to the allegation that Respondent discharged him unlawfully for engaging in Union activities.

When a party asserts that a certain individual is a supervisor, the Board places the burden of proof on that party.

Lange testified that at the end of his employment with Respondent, his title had been "leadman/foreman." Eight employees worked in the shop where Lange performed this function. Lange spent much of his workday at a machine, performing tasks similar to those of the others in the shop. He estimated that he spent 80 percent of his time on the job performing such production work.

However, his duties also included making sure that these employees remained busy. As he described it, "I'd just look around while I was at the saw and then if they weren't doing it—I could usually tell if they weren't doing anything. Then, I'd just look on the back order list, go over there and tell them that this is what they got to do next."

At all times material to the complaint, Respondent's work rules told employees to let "Cliff, Michelle or Calvin, know if you have to work or want to work overtime." ("Cliff" refers to Cliff Porter, who owns a one–half interest in Respondent. "Michelle' refers to Michelle Clark–Ames, Porter's daughter, who owns a one–quarter interest in Respondent. "Calvin" refers to Calvin Lange.)

According to Lange, neither Porter nor Clark–Ames had called him a "supervisor" before November 23, 2001. On the other hand, on March 17, 1999, Lange signed a disciplinary warning issued to employee Russ Johnson, and this warning identified Lange as "Ship [sic] Forman [sic]." Specifically, that warning stated:

> Russ Johnson missed work on March 16, 1999. He did not call in. He returned to work on March 17, 1999.
>
> After being asked by shop Forman [sic], Calvin Lange, why we [sic] was not a[t] work yesterday, Russ replied he was sick and dose [sic] not have a phone at home, I know I should have called in.
>
> This is the 1st warning.

In addition to Lange, the warning also bore the signature of Michelle Clark. (Her last name later changed, after marriage, to Clark–Ames.) Lange testified that Michelle Clark–Ames had asked him to find out from Johnson why he wasn't at work, and then reported Johnson's response to Clark–Ames. According to Lange, Clark–Ames prepared the disciplinary notice and had Lange sign it.

On April 12, 1999, Lange signed a disciplinary warning issued to employee Brian Helmers and again, this warning identified Lange as "Ship [sic] Forman [sic]." This warning stated:

> Brian Helmers missed work on April 9, 1999. He did not call in. He returned to work on April 12, 1999.
>
> After being asked by shop Forman [sic], Calvin Lange, and Michelle Clark why we [sic] was not at work on the 9th, Brian replied he was sick asked why he didn't call in Brian replied he didn't know he had too. [sic]
>
> This is the first warning

Respondent later discharged Helmers. The November 2, 1999 discharge notice, signed by Michelle Clark and Calvin Lange, identified Lange as "Shop Forman [sic]" According to Lange, he received instructions from Clark–Ames to ask Helmers about his absence and reported the information back to her. Later, she asked Lange to sign the disciplinary notice and he did.

Based on these disciplinary notices, I conclude that Calvin Lange had the title "foreman" at least as early as March 17, 1999, well before the Union organizing campaign which led up to the December 13, 2001 election. However, the Board does not determine an individual's supervisory status, or lack of it, based on that person's title. Rather, the Board looks to the criteria set forth in Section 2(11) of the Act.

The Act defines "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform at least one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Determining whether Calvin Lange discharged any employee requires me to determine which witnesses should be credited. Bonnie Williams, who works as a secretary–receptionist in Respondent's office, testified that on one occasion in December 2000, Lange "came in and told me that he fired Kenny Rhea." She made the following notation on a piece of paper which she placed in Rhea's personnel file:

> 12/14/00
> Calvin stated he had just fired Kenny Rhea. He had done this before or right around 8:00, when I came in.—Bonnie

Calvin Lange denied discharging Rhea. According to Lange, Rhea had an appointment at 11:00 that morning, left work to go to the appointment and never returned. "I never talked to him," Lange testified, "since that day."

For the following reasons, I credit Williams' testimony rather than Lange's. First, the record establishes that Lange told at least one other employee that he had authority to hire and fire. Specifically, employee Norma Greenwood testified that Calvin Lange "told me that he had the right to fire and hire whoever he wanted."

Ms. Greenwood's demeanor as a witness created the very strong impression that she was telling the truth. She was plain

talking and forthright, and her responses on cross–examination actually increased her credibility. Based on her testimony, which I credit, I find that Lange did tell her that he had the authority to hire and fire.

On the witness stand, Calvin Lange denied having power to hire or discharge. The prior inconsistent statement he made to Ms. Greenwood, described above, adversely affects his credibility.

Second, Lange admitted that he told a lie to employee John Lyon. Specifically, he testified that November 23, 2001, he told Lyon that he, Lange, had been discharged. Although Lange characterized this statement as a joke, he did not dispute its falsity. The fact that he would make an untrue statement to a worker does not, by itself, establish that his testimony under oath is unreliable, but to some extent, it does detract from his credibility.

Even though Lange told Greenwood that he fired Rhea, there remains a possibility that this statement was untrue. It might be no more trustworthy than Lange's false statement to Lyon that he, Lange, had been discharged. In other words, even if Lange had lied to Greenwood about firing Rhea, he still might have been telling the truth when he testified that Rhea simply left work for an appointment and never came back.

Such a possibility appears unlikely. Commonly, employees do not just leave work and never return. Conceivably, an employee might do so if he had just had an argument with his supervisor or, perhaps, if he had just won a large sum in a lottery. The record here does not indicate that Rhea had any such reason to quit his job precipitously. Therefore, I conclude that Rhea was discharged.

Both Owner Porter and Owner Clark–Ames were away from the facility on the day Rhea's employment ended, leaving Lange as the highest–ranking person on the premises. When they returned, neither Porter nor Clark–Ames reinstated Rhea. In these circumstances, I conclude that Calvin Lange did discharge Rhea. Further, considering the absence of any higher official on this occasion, it appears clear that Lange exercised independent judgment in deciding to discharge Rhea. I so find.

The evidence also establishes that Lange directed the day–to–day activities of the eight shop employees. Each morning, Lange would get a "back order list" from the office. This list specified the work which customers had ordered and gave some indication of the time target for finishing the work. Using this list, Lange assigned work to employees who had finished their previous assignments. On direct examination, he testified, "I'd just look around while I was at the saw and then if they weren't doing it—I could usually tell if they weren't doing anything. Then, I'd just look on the back order list, go over there and tell them that this is what they got to do next."

In view of this testimony, there can be little doubt that one of Lange's duties involved assigning work to employees. Additionally, it cannot be contested that in making these job assignments, Lange was acting in the interest of his employer.

The parties do disagree about whether Lange was exercising independent judgment when he performed such assignments. The General Counsel argues that Lange was performing essentially a routine, clerical function. Specifically, the General Counsel notes that all employees had access to the back order list, and sometimes an employee would look at the list and decide for himself what to do next, rather than being directed by Lange.

The record falls short of establishing that Lange exercised significant independent judgment when he assigned work to the employees. Standing alone, Lange's authority to assign work would be insufficient to establish supervisory status.

Lange also possessed authority to grant overtime. He admitted having such authority while being cross–examined about his talking with employees during their working time:

> Q. But you talked to them when you were the person who was supposed to be keeping them busy?
> A. Yeah.
> Q. When you were the person who approved their overtime?
> A. Yeah.

Lange's testimony downplays any use of independent judgment in exercising this authority. Thus, on cross–examination, Lange testified that when someone requested overtime he would "go talk to Cliff and Michelle to see if it was okay. . ." On the other hand, the record does not establish that the owners *required* or directed Lange to consult with them before approving overtime. It appears more likely that Lange chose to do so on his own.

Lange testified that when the owners were away from the premises, no employee asked him for permission to work overtime. However, on further questioning, Lange admitted that he didn't know "for sure" whether an employee had asked for overtime when Porter and Clark–Ames were away. Lange also admitted that a work rule had required employees to ask him for permission to work overtime when Porter and Clark–Ames were not around.

Although the General Counsel argues that Porter and Clark–Ames were almost always present at the facility, the evidence establishes that sometimes both were away at the same time. Porter credibly testified that he takes trips to call on customers in foreign countries. On one such trip, he spent 30 days in Australia. I find that in promulgating the work rule requiring employees to ask either one of them or Lange for permission to work overtime, the owners contemplated that in their absence, Lange would use independent judgment in granting or denying such requests.

As discussed above, Calvin Lange possessed authority to discharge employees and used it on one occasion when neither Porter nor Clark–Ames was present at the facility. Additionally, he had authority to approve overtime requests, and Respondent's work rules specifically mentioned this authority. In these circumstances, I find that at all material times before his discharge, Lange was Respondent's supervisor within the meaning of Section 2(11) of the Act.

Therefore, I recommend that the Board sustain the challenge to the ballot Calvin Lange cast in the December 13, 2001 election. Additionally, for reasons discussed more fully below, I recommend that the Board dismiss the allegation that Respondent unlawfully discharged Lange because of the Union activities.

Supervisory Status of Donald Meier

Respondent also contends that Donald Meier, Jr. was, during his employment, a supervisor within the meaning of Section 2(11) of the Act. Resolution of this issue will determine whether Meier's challenged ballot should be opened and counted or whether the challenge to that ballot should be sustained. Additionally, the complaint alleges that Respondent unlawfully discharged Meier, and his supervisory status, or lack of it, will affect the protection afforded him by the Act.

Meier's job title was "repair department foreman" and his duties included assigning work to employees in this department and keeping them busy. When a customer had a problem with a pump, Meier would confer with the customer about it. Meier's duties also included performing work similar to that done by others in this department, such as welding, running a lathe and a hone, and rebuilding pumps and motors.

A person can meet the statutory definition of "supervisor" by having authority to assign work to other employees, provided that doing so is not of a merely routine or clerical nature but requires the use of independent judgment. Respondent, having asserted that Meier is a supervisor, bears the burden of proving that he used independent judgment when he assigned work to employees.

Although the record discloses that customers discussed with Meier the mechanical problems they wanted fixed, the evidence does not reveal the extent of Meier's problem–solving authority. Similarly, the record does not establish that Meier used independent judgment in solving production problems which might arise while employees performed their tasks. The evidence also does not demonstrate that Meier's assignment of work to employees was other than routine.

For example, Donald Meier ostensibly had authority to direct the work of John Lyon. Although Respondent called Lyon to the witness stand and asked him about Meier's authority, his testimony does not support a conclusion that Meier's supervisory duties entailed much independent judgment:

> Q. Who told you what you needed to do when you ran the lathe?
> A. Calvin did and Cliff did depending on what we were doing.
> Q. I'm sorry. Maybe I made a mistake here. When you ran the lathe were you in the west building or in the east building?
> A. The west building.
> Q. Okay. And was Calvin Lange your foreman or was Donnie Meier?
> A. Donnie Meier was.
> Q. Okay. Why is that Calvin would tell you what to do?
> A. Calvin would come across the street whenever—when Michelle would tell him something to do to come up and tell me what to do if it needed to be done if Donnie was busy with something else.

Clearly, Calvin Lange and Michelle Clark–Ames played a considerable role in directing the work of the employees ostensibly under Meier's supervision. A preponderance of the evidence fails to establish that Meier's direction of employees was more than routine.

The credible evidence establishes, and I find, that Meier essentially made work assignments in the way a skilled leadman generally makes such assignments, by taking note of employees' skills and experience with respect to particular tasks. Assignments made in this manner do not require the exercise of independent judgment sufficient to satisfy the statutory definition. See *Hausner Hard–Chrome of Kentucky, Inc.*, 326 NLRB 426 (1998).

In sum, I conclude that Meier is not a supervisor within the meaning of Section 2(11) of the Act. Therefore, I recommend that the Board overrule the challenge to the ballot he cast in the December 13, 2001 election.

Supervisory Status of Jamie Lange

Respondent contends that before his discharge, Jamie Lange held the title of shipping department manager and was a supervisor within the meaning of Section 2(11) of the Act. Lange cast a challenged ballot in the December 13, 2001 election. Additionally, the complaint alleges that Respondent discharged him unlawfully. His supervisory status, or lack of it, affects the resolution of both of these issues.

Jamie Lange and one other person worked in the Respondent's shipping department. Respondent's brief stated that his "job was to keep all of the parts moving, and communicate with Calvin Lange concerning inventory and the need for parts to be made." Additionally, Respondent contends that Owner Porter placed Jamie Lange in charge of the shop when Calvin Lange was absent.

The record does not established that Jamie Lange possessed any of the powers enumerated in Section 2(11) of the Act except, possibly, the assignment of work. However, the evidence does not establish that Lange's work assignment duties were other than routine, or that he exercised independent judgment in fulfilling these duties.

I conclude that Respondent has not carried its burden of proving that Jamie Lange was a supervisor within the meaning of Section 2(11) of the Act, and find that he was not. Therefore, I recommend that the Board overrule the challenge to his ballot.

The November 23, 2001 Meeting

The complaint alleges that Owner Porter made a number of unlawful statements when he met on November 23, 2001 with Calvin Lange, Jamie Lange, and Donald Meier, who worked for Respondent. Porter considered these three individuals to be supervisors but as discussed above, the record establishes only that one of them—Calvin Lange—satisfied the statutory definition of "supervisor." Porter did not summon these three to his office, but met with them in Respondent's main building by machines called CNC lathes.

Porter spoke with these men about a number of things, including a statement Calvin Lange had made to employee John Lyon. As Lange admitted on the witness stand, he had told Lyon "If you don't vote for the union I'm going to give you a blanket party," a slang phrase meaning that Lange would throw a blanket over Lyon's head and beat him up. The record leaves no doubt that Lange used the term "blanket party" in this assaultive sense and that Lange understood his meaning. Lange

testified that he made the statement in jest, but it offended Lyon.

Although Porter did not know it at the time of the November 23, 2001 meeting, there had been two previous instances of violence against Lyon, whose work attitudes may have engendered some resentment. One of the alleged discriminatees, Donald Meier, explained that Lyon

> . . . is a very good worker. He stays right at it and he thinks everybody else should be working as hard as he is, and he gets angry if this person ain't doing this or this person he thinks should be doing that, and some people get arguments with him just because, you know, they think they are doing enough work and he doesn't think they are doing enough work.

Meier does not suggest that Lyon did anything to provoke the two attacks against him. To the contrary, undisputed evidence establishes that in each instance, the other employee was the aggressor. In one of those instances, a worker had poked Lyon in the eye, causing temporary injury. In the other instance, Lyon was on a forklift when another employee hit the forklift with a metal rod and tried to pull Lyon off to beat him.

Lyon was not the only employee who displayed a particularly conscientious attitude towards work duties. Another such worker, Norma Greenwood, had become the target of pranks.

Greenwood, a lathe operator, described instances in which her work area would be neat when she left for lunch, but she would return to find stuff thrown all over the floor and grease on her machine handles. She also testified that she would bring her own brooms to work to keep the area clean, and someone would hide them.

As discussed above, Greenwood was a reliable witness whose testimony I have credited. She was also a conscientious employee obviously irked by these incidents. Although she complained to her foreman, Calvin Lange, he admittedly took no action on her complaints and did not communicate those complaints to higher management. When Lange failed to act, Greenwood complained to Michelle Clark–Ames, who is both one of Respondent's owners and also the daughter of its president. Thus, higher management was aware both that Greenwood had been the victim of pranks which interfered with work, and that Calvin Lange had failed to act on Greenwood's complaints.

Clearly, Owner Porter regarded Supervisor Lange's failure to protect a conscientious employee from harassment as inconsistent with the supervisor's duty to facilitate production. However, it appears that Porter suspected Lange not merely had turned a blind eye to the pranks but actually had instigated the mischief. Thus, during the November 23, 2001 meeting with Calvin Lange, Jamie Lange, and Donald Meier, Porter accused them of "pulling pranks" and "intimidating employees."

However, when Porter met with the three men on November 23, he had more on his mind than the harassment of conscientious employees. Porter's statements to them make clear that he was still smarting from a recent inspection by the Occupational Safety and Health Administration, and he also was concerned about the Union's petition for a representation election.

As noted above, Porter considered these three men to be supervisors, not "employees," as that term is used in the Act. If Porter had been correct, any statements he made solely in their presence could not violate Section 8(a)(1) of the Act because that section prohibits interference with the rights of employees, not supervisors. Porter was so confident that he was talking to supervisors, not employees, that he made a tape recording of the meeting and provided a copy to the Board.

However, Porter was wrong. Neither Jamie Lange nor Donald Meier met the statutory definition of "supervisor." Statements Porter made in their presence could well be unlawful if such statements, judged by an objective standard, would reasonably tend to interfere with, restrain or coerce employees in the exercise of Section 7 rights.

To prove that a statement violated Section 8(a)(1) of the Act, the government does not have to show that the speaker *intended* to interfere with protected rights. The law focuses on the likely effect of the statement, not on the speaker's reason for making it. In examining the alleged violative statements, I will apply the Board's objective standard to determine their lawfulness.

Complaint Paragraph 5(a)

Complaint paragraph 5(a) alleges that on about November 23, 2001, Respondent, by its President and Owner Porter, at Respondent's Pocahontas facility, interrogated employees about their union activities. Porter admitted asking Calvin Lange, Donald Meier, and Jamie Lange, "So what are you hearing about who is pushing the union thing?" Porter also admitted saying to them "Who is pushing the union thing? You guys don't know about that either, huh?"

In evaluating the lawfulness of these questions, I rely upon *Smith and Johnson Construction Co.*, 324 NLRB 970 (October 31, 1997). In that case, the Board affirmed the administrative law judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The judge had described the framework for that analysis in these terms:

> In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.'' The Board in *Rossmore House* noted the [test set forth in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The *Bourne* test factors are as follows:
>
> 1. The background, i.e. is there a history of employer hostility and discrimination?
>
> 2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> 3. The identity of the questioner, i.e. how high was he in the Company hierarchy?
>
> 4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality''?

5. Truthfulness of the reply.

Applying these factors, I conclude that Porter's questions to the employees were unlawful. The questions sought the identity of union advocates, information which could be used as a basis for taking action against individual employees. The record does not suggest any legitimate reason for Respondent to seek this information, so I must conclude that the employees who heard these questions would believe that the questioner contemplated retaliation. In this context, the questions would certainly tend to interfere with the exercise of Section 7 rights.

The questioner occupied the highest position in the corporate hierarchy. He owned a one–half interest in the Respondent and was its president. Porter's position and authority reasonably would increase the coercive effect of the questions he asked.

Additionally, it appears that the employees did not respond truthfully. Thus, Porter's comment—"You guys don't know about that, either"—indicates that the employees did not identify those supporting the Union.

On the other hand, two factors weigh in favor of a finding that the questions were not violative. The meeting did not take place in Porter's office but in the working area of the plant. Additionally, at that point, there did not appear to be a history of employer hostility towards the Union.

However, I conclude that the three factors which support finding a violation outweigh the two factors which favor finding no violation. The fact that Respondent's president, who had plenary power to take disciplinary action against employees, asked about the identity of union adherents creates the clear impression that employees who supported the Union might suffer adverse employment consequences. This impression interferes with, restrains and coerces employees in the exercise of Section 7 rights. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) as alleged in complaint paragraph 5(a).

Complaint Paragraph 5(b)

Complaint paragraph 5(b) alleges that during this same conversation, Respondent, by Porter, threatened employees by telling them they would be suspended because of their bad attitude and their union activities.

The General Counsel does not claim that Porter specifically told the men "you will be suspended because of your bad attitude and your union activities." Rather, the government appears to contend that Porter conveyed this message using other words. Citing the tape recording which Porter made of the meeting, the General Counsel's brief states:

> . . . Porter accused the three employees of intimidating employees and telling them if they did not belong to the Union, they were going to do "this or that." Porter then told them that the three of them and Jimmy (Lange) too, have bad attitudes. He later testified that the bad attitude he was referring to was, in part, their support for the Union. (Tr. 93). They accused Porter of also having a bad attitude. Porter then threatened them with suspension by telling them that if they did not want to work there, they should go home. He then said they should take two weeks off right then "until we get this whole goddamn thing straightened out."

In effect, the General Counsel is excerpting Porter's statements from different parts of the meeting and then offering the excerpts collectively to establish a violation. Although it is quite appropriate to consider various remarks together to understand the overall theme of a discussion, excerpting must be used carefully to avoid taking statements out of context. In a newscast, for example, "sound bites" may be selected which represent the whole fairly, but "sound bites" also can mislead when clarifying statements are left on the cutting room floor.

To prove the threat alleged in complaint paragraph 5(b), the government first points to a "sound bite" from the beginning of the tape recording of the November 23 meeting.

> It [seems] to me that we're having a little attitude problem around here. And, uh, we're also having some intimidation around here, and that's all going to come to a halt right now, today . . .You guys have been going around here intimidating guys, [telling] them if they don't belong to the union you're going to do this or that.

Clearly, Porter was referring to the statement Calvin Lange made to John Lyon, namely, that if Lyon did not vote for the Union, Lange would give him a "blanket party," meaning that Lange would throw a blanket over Lyon's head and beat him up.

If Lange had threatened to do violence unless Lyon gave him a dollar, such a threat clearly would have been improper. The "blanket party" statement does not become any more proper, or legally protected, merely because the speaker sought to extort support for the Union rather than money.

In sum, Porter's references to "attitude problem" and "intimidation" did not concern any protected activities but rather focused on conduct which was unprotected, such as the "blanket party" threat which Calvin Lange, accompanied by Donald Meier, made to John Lyon. Clearly, the men who heard Porter's statement understood it in this manner. Indeed, the tape recording of the November 23 meeting reveals that at one point, one of the men, apparently Calvin Lange, protested that he had been joking. Such a statement indicates that he was quite aware of what Porter meant by "intimidation."

In certain cases, an employer can use the word "intimidation" as a code word for "union activity." In such circumstances, both the speaker and the hearer reasonably will understand that "intimidation" carries a meaning different from the definition in the dictionary. When that happens, of course, a warning against "intimidation" really is a threat to chill union activity and therefore unlawful under the Act.

In the present case, however, the context makes clear that Porter was not using the word "intimidation" as a synonym for "union activity" and the listeners reasonably would not believe it carried that meaning. Specifically, there already had been instances of violence in the workplace and the parties to the November 23 conversation were quite aware of Calvin Lange's "blanket party" threat to employee Lyon.

The General Counsel's argument also depends on statements made by Porter later in the November 23 meeting. The General Counsel's brief referred to these remarks as follows:

> Porter then threatened them with suspension by telling them that if they did not want to work there, they should go home.

> He then said they should take two weeks off right then "until we get this whole goddamn thing straightened out."

As noted above, Porter did not specifically threaten the men with suspension but instead, as the General Counsel's brief states, told them that if they did not want to work there, they should go home. Significantly, Porter did not make this remark in the context of employees' union activities. Rather, Porter was talking about problems in the shop, notably, an employee who did not want to clean up spilled oil.

One of the men, apparently Calvin Lange, disputed Porter's version and accused him of twisting the facts around. Porter replied "I ain't the one that's twisting it around." One of the men made a response which is unintelligible on the tape, and then Porter asked "So what's your problem?" The man replied, "I'm just saying you twisted it around." Then Porter stated:

> I'm going to tell you guys, if you don't want to work here, go home. In fact, I think you ought to take off two weeks right now, till we get this whole goddam thing straightened out.

Clearly, Porter did not suggest that the men take off work because they were engaged in union activities. To the contrary, Porter became irritated because one of the men accused him, twice, of twisting the facts concerning an incident unrelated to union activity. His response, suggesting that the men go home, does not constitute a threat of suspension for engaging in protected activities.

The General Counsel's argument also relies on Porter's remark to the men that they had a "bad attitude" and Porter's apparent admission, on page 93 of the transcript, that he had used the phrase "bad attitude" to mean union activities. Called as an adverse witness by the General Counsel, Porter testified, in part, as follows:

> Q. And you were upset as well at Jamie and Don because they supported the union too, isn't that true? I mean that's what their attitude was that you didn't like?
> A. That's right. I didn't like their attitude at all.

If that one answer is considered in isolation, it appears to be an admission that Porter considered the men to have a bad attitude because they were prounion. However, the next question and answer suggest otherwise:

> Q. And it was because they supported the union as Calvin did?
> A. I don't know if that's the reason they changed their attitude just on account of the union but they kind of changed their attitude just before the union vote, and they made several remarks about Michelle was really mean to them and I said, "Well, exactly what is she doing to be mean to you?" Well, they couldn't really nail down any one thing and you know what they told me? They told me—they said it's mainly the faces she makes because she'd go out there and they'd all three be standing in a huddle. More so not Donnie as much as Jamie and Calvin and Jimmy, and I went out there on several occasions and they'd be standing there talking about things and I'll guarantee they wasn't talking about doing work.

From this answer and other portions of Porter's testimony, I conclude that he was not using the term "bad attitude" as a euphemism for "prounion sympathies." Rather, he considered these men to have a bad attitude because they manifested disdain for their responsibilities—they stood around talking when they should have been working—and because they criticized his daughter, Michelle Clark–Ames.

As noted above, Porter considered Calvin Lange, Jamie Lange, and Donald Meier to be his supervisors. During the November 23 meeting, Porter mentioned a number of things which needed correction in the shop, including diesel oil spills on the floor, tools scattered around rather than put away, and employees being subjected to pranks. As the tape recording of this meeting establishes, the three men did not express a willingness to correct these problems. Instead, the men repeatedly interrupted Porter and argued with him. I find that when Porter used the term "bad attitude," he was not referring to union sympathies but rather the three men's resistance to following his instructions and their apparent lack of commitment to correcting the problems he identified.

The General Counsel's argument also rests on a number of cases in which the Board has found that when a management official used the term "bad attitude," the official really meant "union sympathies." For example, the Board stated in *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998), "The Board has repeatedly found, with court approval, that, in a labor–relations context, company complaints about a "bad attitude" are often euphemisms for prounion sentiments. E.g., *Promenade Garage Corp.*, 314 NLRB 172, 180 (1994); *Helena Laboratories Corp.*, 225 NLRB 257, 269 (1976), enf. in pertinent part 557 F.2d 1183 (5th Cir. 1977); *L.S. Ayres & Co.*, 221 NLRB 1344, 1345 (1976), enfd. 94 LRRM 3210 (4th Cir. 1977).

It should be noted that the Board found that the words "bad attitude" *are often* euphemisms for prounion sentiments, but the Board has not held that the words "bad attitude" always, without exception, have this meaning. The Board has not, as a matter of law, rewritten the dictionary to equate the words "bad attitude" invariably with "union sympathies." Rather, in each case the Board makes findings of facts to determine whether the words "bad attitude," in that particular context, connote union sympathies or union activities.

When Porter's remarks at the November 23 meeting are considered as a whole, it is clear that he was not focusing on union sympathies when he said that the three men had a "bad attitude." Moreover, in context, the words "bad attitude" reasonably would not be understood to refer to union activities. Therefore, I do not find that Porter was using the term as a synonym for union activities.

In sum, I conclude that the government has not established the violation alleged in complaint paragraph 5(b). Therefore, I recommend that the Board dismiss this allegation.

Complaint paragraph 5(c)

Complaint paragraph 5(c) alleges that during this same conversation, Respondent, by Porter, told employees that he knew who had brought the Union in, thereby creating the impression that its employees' Union activities were under surveillance.

The government's brief refers to Porter's comments about seeing employees standing in groups of three and his conclusion that the employees were not talking about work. From these facts, the General Counsel urges a sinister conclusion. Specifically, the brief argues as follows:

> When Porter told them that ". . . there's two or three guys standing in a, in a group, visiting, and you ain't visiting about work, I'm going to give you a clue. . .that ain't what's happening. . .so if you don't want to work here . . . just go home . . . I think you ought to take a couple of weeks off and think about what you are doing right now. . .because I'm tired of this bullshit" (GCX6), he suggests that he knows they are talking about the Union, thereby giving the impression that their Union activities are under surveillance, in violation of Section 8(a)(1) as alleged in the complaint.

Standing alone, the statements attributed to Porter are ambiguous. It is possible to project an unlawful meaning onto these words in the same way that a dark design may be seen in an inkblot. When these words are considered in context, however, it becomes clear that Porter was not talking about employees' union activities.

The tape of the November 23 meeting discloses that immediately before the remarks quoted in the General Counsel's brief, Porter was talking about employees leaving tools around in the work area. Both his tone of voice and coarse words made clear that Porter was quite peeved by the employees' failure to put away their tools.

Then, Porter moved to the topic of employees standing around talking rather than working. The General Counsel argues that Porter's remark, "you ain't visiting about work," refers to discussions about the Union, but it equally could refer to other forms of socializing. The government has the burden of proving that Porter's ambiguous statement did, indeed, refer to union activity, but it has not carried that burden.

To the contrary, the context strongly suggests that Porter simply was complaining that employees were engaged in idle talk rather than attending to their job duties. As already noted, immediately before this comment Porter's subject concerned employees who failed to put away their tools. The tape reveals that immediately after the comments quoted above, Porter complained to the three men about having to come out every day and "hound" them.

A clear theme emerges from these comments: Porter considered these three men to be supervisors and wanted them to make sure that employees worked and then put away their tools. He did not want to come into the shop and see employees idle or their tools out of place. If these three men, his "supervisors," did not have the will to remedy the problems, Porter suggested, they should not be working.

Applying an objective standard, I conclude that those who heard these remarks would not reasonably understand them to mean that Porter was keeping employees' union activities under surveillance. Therefore, I recommend that the Board dismiss the allegations in complaint paragraph 5(c).

Complaint Paragraph 5(d)

Complaint paragraph 5(d) alleges that during this same conversation, Respondent, by Porter, threatened employees that it would get rid of them because of their activities on behalf of the Union. The General Counsel's brief explains this allegation as follows:

> During the course of this discussion, Porter also threatened to get rid of the three because of their activity on behalf of the Union. This threat is contained in Porter's following comments at the meeting: ". . . I'm tired of it . . . if you guys don't . . . if you guys don't want to work here . . . leave, shit, you could leave . . . that's one nice thing about the old USA, you can quit and leave any time you want to. See, I'm . . . I'm tired of this bullshit. See, I had another guy working here one time and he tried the same shit, ya know. You know who it was . . . it was Mark . . . he was going around trying to intimidate people too . . . I got rid of him forever . . ." (GCX6) This threat to get rid of the three employees because they support the Union and talk to others in support of the Union violat[es] Section 8(a)(1) as alleged in the complaint . . .

Even though the General Counsel's brief speaks of a threat to get rid of three employees *because they supported the Union*, none of Porter's comments, quoted above, specifically mentions the Union or the organizing campaign. The government bears the burden of proving that Porter's comments really concerned the employees' protected activities.

It is true that during this rather long meeting, Porter mentioned the Union more than once. It is also true that some of his statements during this meeting violated Section 8(a)(1) of the Act. However, the discussion touched on a number of matters, and Porter clearly was upset about many things, ranging from untidy shop conditions to the recent visit of an OSHA inspector. It is not at all clear that when Porter said "I'm tired of this bullshit," he was referring to the union organizing drive.

To the contrary, the evidence suggests that he was not. Immediately after proclaiming that he was "tired of this bullshit," Porter went on to say that he had "had another guy working here one time and he tried the same shit . . . it was Mark . . . he was going around trying to intimidate people too . . ."

Nothing in the record indicates that this employee named "Mark" tried to organize a union and such a fact cannot simply be assumed. Certainly, Porter did not state that this "Mark" engaged in union activity. Instead, Porter said that Mark "was going around trying to intimidate people too . . ."

Porter had reason to believe that at least two of the three men attending the November 23 meeting—Calvin Lange and Donald Meier—had tried to intimidate an employee because of the "blanket party" threat Lange made, in Meier's presence, to John Lyon. When Porter told them that "Mark" had gone around "trying to intimidate people too," those words reasonably would be understood to refer to the making of threats, not to protected activities.

Indeed, Calvin Lange's response to Porter's statement is not consistent with a finding that Lange understood Porter's use of the word "intimidate" to refer to union activities. After Porter said that Mark "was going around trying to intimidate people

too and I got rid of him," Calvin Lange replied, "He didn't intimidate me. Ever."

Porter disagreed, saying, "Oh, you and him got into fights all the time . . . " At that point, Lange interrupted, saying "Yeah, but he didn't intimidate me, as I said, I'd knock him . . ."

Porter then suggested that other people would, in fact, be intimidated, and accused the men of pulling pranks on employees. Clearly, this exchange had nothing to do with protected activity. It concerned bullying and workplace violence. Porter lawfully could threaten to discipline employees who engaged in such conduct.

In sum, the government has not established that Porter's statements, quoted above, either referred to the Union or would reasonably be understood to refer to the Union. Therefore, I conclude that the General Counsel has not established, by a preponderance of the evidence, the allegations raised in complaint paragraph 5(d). Therefore, I recommend that the Board dismiss this allegation.

Complaint paragraph 5(e)

Complaint paragraph 5(e) alleges that during this same conversation, Respondent, by Porter, threatened the employees that they could not vote in any election because they were supervisors. The General Counsel's brief summarizes of the facts which form the basis for this allegation:

As the meeting went on, Porter again questioned each of the three as to what they knew about the Union. (GC Exh. 6) He then announced to Calvin, Donald, and Jamie that they were supervisors and that they could not vote in the upcoming election. He got a paper from his car that said that "managers and supervisors" cannot vote. (GC Exh. 6) They disagreed that they were supervisors and Porter said "So I think you guys ought to just take off and, for a couple of weeks until I get hold of a lawyer and get this all straightened out." (GC Exh. 6)

The government's brief, however, omits three sentences which tend to cast Porter's comments in a slightly different light. After Porter showed the men a paper saying that managers and supervisors could not vote, one of them protested that they were not supervisors. Porter replied, "Well, I thought you was."

At that point, one of the men remarked that no one had told him that he was a supervisor and Porter replied, "See, we're going to have a hearing about this . . . So we'll find out."

At that point, after saying "So we'll find out," Porter added the remark quoted in the General Counsel's brief: "So I think you guys ought to just take off for a couple of weeks until I get hold of a lawyer and get all this straightened out." (Notwithstanding this comment, Porter did not lay the men off and they did not take time off work.)

Citing *Shelby Memorial Home*, 305 NLRB 910, 918–919 (1991), the General Counsel argues that Porter violated Section 8(a)(1) by erroneously telling the three men that they could not vote in the election because they were supervisors. That case, however, involved management's clear and unequivocal statement to employees that they were supervisors and not entitled to vote or engage in protected activity. Porter's statements, by comparison, were much more tentative.

Thus, when the men disagreed with Porter's characterization of them as supervisors, Porter did not insist that he was correct but instead said that they were going to have a hearing about it and would find out. Moreover, unlike management in *Shelby Memorial Home*, Porter did not tell the men that they had no right to engage in protected activities.

In these circumstances, I believe that the facts of the present case distinguish it from *Shelby Memorial Home*. Further, I conclude that Porter's statement, indicating that he thought the men were supervisors, did not interfere with, restrain, or coerced them in the exercise of protected rights. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 5(e).

Complaint Paragraphs 5(f) and 5(g)

Complaint paragraph 5(f) alleges that during this same conversation, Respondent, by Porter, threatened employees that the Union was not going to get in his company, thereby telling employees that representation by the Union would be futile. Complaint paragraph 5(g) alleges that during this same conversation, Respondent, by Porter, threatened the employees that Respondent would not sign a contract if they were represented by the Union.

The tape recording Porter made of the November 23, 2001 meeting establishes that he said the following:

> Well, if you guys think that the union's going to run this place, it isn't going to happen. I'm going to tell you that right up front. And if the union gets in here, which they might, I don't care one way or the other, it doesn't make any difference to me if they vote the union in or not, but then the union will have to come and get a contract from me and I won't give the union a contract at all.

Additionally, in his testimony, Porter admitted saying "the union will have to come and get a contract from me and I won't give the union a contract at all. I'll just job the stuff out."

Porter's statements, quoted above, are tantamount to telling employees that selecting a union representative would be a futile act. The Board often has held that such statements concerning the futility of representation interfere with the exercise of Section 7 rights. See, e.g., *Mohawk Industries*, 334 NLRB 1170 (August 28, 2001). I recommend that the Board find Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(f) and 5(g).

Complaint paragraph 5(h)

Complaint paragraph 5(h) alleges that during this same conversation, Respondent, by Porter, threatened employees that he could close the plant because of their efforts to seek representation by the Union. In his testimony, Porter admitted saying "I can get rid of most of these people here and just dwindle their jobs down, you know. Job everything out." He also admitted telling the men "I'm almost 70 years old and I can close this goddamn place and sell it out . . ."

Considered in context, Porter's admitted statements, that he could "job everything out" and "just dwindle their jobs down" and that he could "close this goddam place and sell it out," clearly convey the message that he would close the plant, or at

least the production portion of the plant, if employees chose union representation. These threats of plant closure interfere with the free exercise of Section 7 rights. I recommend that the Board find that Respondent violated Section 8(a)(1) as alleged in complaint paragraph 5(h).

Other Alleged 8(a)(1) Violations

The complaint alleges that on certain occasions after this November 23, 2001 meeting Owner Porter and Secretary–Treasurer Clark–Ames made other statements to employees which violated Section 8(a)(1) of the Act. These allegations will be discussed in the order they appear in the complaint.

Complaint Paragraph 5(i)

Complaint paragraph 5(i) alleges that on about November 29, 2001, Respondent by its President and Owner Porter, at Respondent's Pocahontas facility, interrogated an employee about the employee's Union activities. On about this date, employee Randall Boles had a conversation at work with John Lyon and Donald Meier. During this conversation, Boles expressed the opinion to Meier that the purpose of a union was to solve disputes and secure a fair wage. Boles also said that he was going to vote for the Union.

Boles testified that shortly after this conversation, he saw Lyon talking with Owner Porter, who then came over to Boles and asked him what he knew about the Union. Boles replied that he did not know anything about it.

Porter denied asking Boles this question. This credibility conflict must be resolved.

Neither Porter nor Boles was a totally disinterested witness. Obviously, the outcome of this case would materially affect Porter's company. On the other hand, Respondent had discharged Boles twice. A desire to get even could have affected Boles' testimony just as a desire to protect his company could have affected Porter's testimony.

Based on my observations of the witnesses, I credit Porter. He appeared to be quite free of guile. More than once, he admitted making statements which violated the Act and he even provided the investigating Board agent a tape recording which proved he made unlawful statements. Additionally, he made other admissions which were not helpful to his case.

For example, on direct examination by Respondent's counsel, Porter stated that when he heard about Calvin Lange's "blanket party" comment to John Lyon, he did not know that two employees previously had assaulted Lyon. Porter also admitted that before the November 23, 2003 meeting with Calvin Lange, Jamie Lange and Donald Meier, he had received from the Board a letter informing him that the Union had filed a representation petition.

Further, Porter admitted that he made up his mind to fire Calvin Lange, Jamie Lange, and Donald Meier after Calvin Lange told Porter that he, Lange, had brought in the Union to punish Porter's daughter. Such an admission on cross–examination would be quite rare, the stuff of Perry Mason novels, but Porter did not make the admission as a result of cross–examination. He made it on direct examination by Respondent's own counsel.

Considering this candor, I conclude that if Porter really had made the statement attributed to him by Boles, he would have admitted it just as readily as he admitted other violative statements. Certainly, he would have nothing to gain by denying that he told Boles the Union would not run his company but at the same time admitting telling others that "I can get rid of most of these people here and just dwindle their jobs down, you know. Job everything out."

Crediting Porter, I find that he did not interrogate Boles concerning employees' union activities. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 5(i).

Complaint Paragraph 5(j)

Complaint paragraph 5(j) alleges that some time during the month of December 2001, Respondent, by Porter, "in a conversation at Respondent's Pocahontas facility, told an employee the Union would never get into the plant and if it did he would close the plant, thereby threatening employees that representation by the Union would be futile and could result in a loss of jobs." To establish this allegation, the government relies on the testimony of Randall Boles.

According to Boles, an hour after Porter asked what he knew about the Union, Porter returned to Boles and asked him again if he knew anything about the Union. Boles testified that after he denied knowing anything about the Union Porter said, "They might get a fucking union in here but they are not going to run my fucking company."

Porter denied having any conversation with Boles about the Union. Therefore, the testimony presents a credibility conflict which must be resolved.

The comment which Boles attributed to Porter—that a union would not run his company—is consistent with the earlier statement which Porter made during the November 23, 2001 meeting, that "if you guys think that the Union's going to run this place, it isn't going to happen" and "I can get rid of most of these people here and just dwindle their jobs down, you know. Job everything out." The General Counsel argues that this consistency weighs in favor of crediting Boles.

However, based on my observations of the witnesses, I credit Porter's denial. As discussed above, Porter was candid even when it was not in his interest. Crediting his testimony, I find that he did not make the statement attributed to him by Boles. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 5(j).

Complaint Paragraph 5(k)

Complaint paragraph 5(k) alleges that sometime in December 2001, Respondent, by Porter, during a conversation at the Pocahontas facility, threatened employees that their bonuses would be reduced or eliminated because of employees' efforts to seek union representation.

Calvin Lange testified that while he was working, Porter came over to him and said that the employees would not be getting bonuses if the Union came in. I do not credit Lange's testimony.

The record indicates that Lange previously had spread untrue rumors that employees would not be receiving a bonus. Moreover, Lange admitted that he told a lie to John Lyon when he saw Lyon at a body shop on November 23, 2001. Because of these false statements, I am reluctant to credit Lange's testi-

mony except where it is corroborated by other evidence. In this instance, it lacks such corroboration.

In sum, I conclude that credible evidence does not establish the allegations raised in complaint paragraph 5(k). Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraphs 5(l), 5(m), 5(n) and 5(p)

Complaint paragraphs 5(l), 5(m), 5(n) and 5(p) concern statements allegedly made by Respondent's president Porter at a meeting of employees in December 2001. More specifically, complaint paragraph 5(l) alleges that Porter threatened employees that they would have less flexibility as to when they could take vacation than they previously enjoyed if they obtained representation by the Union. Complaint paragraph 5(m) alleges that sometime in December 2001, Porter threatened to make employees work at night if they chose the Union to represent them. Complaint paragraph 5(n) alleges that sometime in December 2001, Porter threatened to reduce employees' hours if they chose the Union to represent them.

Complaint paragraph 5(p) alleges that Porter threatened employees that he might lay some employees off because of employees' union activities. Respondent denies all of these allegations.

Employee Jim Lange testified as follows concerning Porter's statements at the same meeting:

> Q. What did Cliff say about the union?
> A. He said the union, you know, about people if they—if people vote for the—vote union they might have to work nights and they might have to cut their hours down to 20 hours a week.
> Q. Did he say anything else you can recall?
> A. I think he probably did but I can't recall it.

Jim Lange's son, Calvin Lange, gave the following testimony concerning Porter's statements at this meeting:

> A. I believe. He said that if the union comes in that you weren't going to get the bonuses or weren't going to get the same benefits as the people that didn't work there.
> Q. Do you remember anything else he said?
> A. He said that—I think he said that he could shut the doors down and not have to worry about anything.
> Q. All right. Do you remember anything else he said?
> A. I don't think there was much else I can remember that Cliff said.

Another of Jim Lange's sons, Jamie Lange, also testified. Jamie Lange is also a cousin of another witness to this meeting, Brad Meier.

According to Jamie Lange, the meeting "started out as a safety meeting." Lange testified that at some point, Porter made comments about the Union:

> Q. What did he say, do you remember?
> A. He said that, you know, things are getting slow around here. He might start laying some people off.
> Q. Now was that—let me rephrase the question. Did he say anything about the union?
> A. He said—he said people if they do go for the union they might not have as many hours and they might be working nights.
> Q. Did he say anything else?
> A. I don't remember him saying anything else . . .

Jim Lange's stepson, Donald Meier, testified that about a week before the December 13, 2001 election, Porter called an employee meeting to discuss forklift safety. According to Meier, during this meeting Porter told the employees

> that people can vote for the Union whatever way they want but they might have to work a night shift or their hours might be cut. Might not get the same benefits. Might not get as much raise as the other employees. Might not get vacation. Might have to take a vacation when they tell us we have to take it.

Brad Meier gave the following testimony concerning Porter's statements at this same meeting:

> A. We were having like an OSHA meeting or something to do with like forklift so he was giving us like training us for the forklift. The union got brought up and he was telling us that he'd have to cut our hours and like make us work nights, people that were union. Then Michelle said something about taking benefits away and stuff if the union got in there because they didn't want it in there. They didn't need them to tell them how to run their company.
> Q. Okay. Do you remember how the union came up? Who it was that brought the union up in that meeting?
> A. Cliff I believe.
> Q. Okay. Do you remember why he brought that union—how the subject came up or why he brought it up?
> A. I don't remember for sure how it was brought in.

Porter denied making any statements about the Union at this meeting. For several reasons, including my observations of the witnesses, I credit Porter and find that he did not make the statements attributed to him.

Superficially, it appears that Porter's version is outnumbered four to one by the testimony of Jim Lange, Calvin Lange, Donald Meier, and Brad Meier. However, because these four witnesses are related to each other, there may be a heightened possibility of collusion warranting a closer look at their testimony.

Witness Jim Lange and his son, Calvin Lange, had different recollections of Porter's comments. According to Jim Lange, Porter said that if the employees voted for the Union they might have to work nights or experience a reduction in their hours. Calvin Lange, did not recall Porter making such comments.

On the other hand, Calvin Lange quoted Porter as saying "that if the Union comes in that you weren't going to get the bonuses or weren't going to get the same benefits as the people that didn't work there." However, Calvin Lange's father did not attribute such a threat to Porter and neither did Calvin Lange's brother, Jamie Lange.

As discussed above, Calvin Lange does not deny that he had made an untrue statement to John Lyon and in view of this falsehood, I have some doubts about his reliability as a witness. Moreover, the evidence establishes that Calvin Lange threat-

ened Lyon with a "blanket party," that is, throwing a blanket over his head and beating him up, if Lyon did not support the Union. Lange's apparent willingness to make a threat of physical harm to advance the Union's cause suggests a partisanship so intense it could affect the reliability of Lange's testimony.

The sketchy nature of the testimony of the government's witnesses also raises concern. For example, Brad Meier testified that he could not recall how the subject of the Union came up at this particular meeting.

As discussed above, Porter appeared to be a witness incapable of guile, and he made a number of admissions damaging to Respondent. There is no reason to believe that he would not be equally candid in admitting the statements alleged in complaint paragraphs 5(l), 5(m), 5(n) and 5(p) had he made such statements. I find that he did not. Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraph 5(o)

Complaint paragraph 5(o) alleges that at the same meeting described in paragraphs 5(l) to 5(n), Respondent's secretary–treasurer, Michelle Clark–Ames, threatened employees that they might lose benefits if they were represented by the Union. Respondent's answer denies this allegation.

To establish this allegation, the government relies on the testimony of a number of employees who attended this meeting. One of them, Jamie Lange, testified as follows:

> Q. Did he [Porter] say anything else?
> A. I don't remember him saying anything else but Michelle said the union people might not have the same benefits as nonunion people like insurance and bonuses.
> Q. Do you remember any other discussion about the union at all during that meeting?
> A. No, I don't.

The General Counsel's brief also refers to the testimony of Donald Meier: "And I believe Michelle said something about we might have to pay for our own insurance if we join the Union because that's a benefit and it's not something they have to do." Meier further testified that on this occasion, neither Porter nor Clark–Ames talked about the collective–bargaining process.

Calvin Lange testified that Clark–Ames "said that—that our vacation—or not our vacation but our insurance and stuff was a benefit and the union members wouldn't get the same benefits as the nonunion members so we probably wouldn't get our insurance paid and stuff like that."

Jim Lange testified "I remember Michelle [Clark–Ames] she said something about if the Union people—you know, on their insurance—they won't—their insurance would be different. You won't have the same insurance as the other people."

According to Brad Meier, "Michelle [Clark–Ames] said something about taking benefits away and stuff if the union got in there because they didn't want it in there. They didn't need them to tell them how to run their company."

The vague nature of this testimony concerns me. For example, Donald Meier did not state unequivocally that Clark–Ames made a particular statement but instead testified "I *believe* Michelle said *something about* . . ." (emphasis added) The tentative nature of this testimony raises some doubt about the sufficiency of Meier's memory.

Similarly, both Jim Lange and Brad Meier testified that Clark–Ames "said something about . . ." Calvin Lange's testimony on this subject began with something of a false start by attributing to Clark–Ames a comment about employees' vacations. Lange then corrected himself by adding that Clark–Ames' comment was not about vacations but about "insurance and stuff . . ." However, he did not explain what he meant by "and stuff."

Michelle Clark–Ames testified that she told the employees that "if a union is voted in, benefits may have to be renegotiated." She explained that she used the word "may" because she "had this paper and it said you have to say 'may'. I made sure that I went by the sheet." She further testified as follows:

> Q. Did you indicate your preference as to whether employees voted for the union or not?
> A. I believe I said that we would prefer not.
> Q. Did you say anything else about how they could vote?
> A. Well I think I said if—we would prefer not to have a union but they could vote any way they wanted. I said that first, and then I went into the, if a union is voted in you may have to renegotiate benefits, which include insurance and bonuses.

Clark–Ames' testimony appears consistent with that of Jamie Lange, who testified only that Clark–Ames "said the Union people might not have the same benefits as nonunion people like insurance and bonuses." She testified that she was careful to use the word "may" and Jamie Lange's version indicates that she used the word "might." Neither account establishes that Clark–Ames threatened that employees *would* lose benefits if they selected the Union.

Calvin Lange's testimony also fell short of stating that Clark–Ames told employees they would lose benefits if they chose union representation. He indicated that she said employees "*probably* wouldn't get our insurance paid and stuff like that." (emphasis added)

The testimony of the General Counsel's other witnesses reveals similar levels of uncertainty about what Clark–Ames said. Thus, Donald Meier prefaced his account with the words "I *believe* Michelle said *something* about . . ." (emphasis added) Similarly, Jim Lange testified that Clark–Ames said "something about . . ." Likewise, Brad Meier testified that Clark–Ames said "something about . . ."

Testimony that a supervisor said "something about" a particular subject falls short of establishing what that speaker actually did say. Moreover, such vague testimony gives no inkling of the totality of the supervisor's remarks.

All the same, the circumstances of this meeting require that the testimony about it be considered thoroughly. The complaint alleges that Clark–Ames made the violative comments at an employee meeting two days before the election. As numerous Board decisions document, employers opposing a union organizing campaign often conduct "captive audience" meetings shortly before an election to persuade employees to vote no. If the December 11, 2001 meeting was, in fact, such a "captive audience" meeting conducted to convey a negative

message about the Union, that context could well affect the message which the employees understood.

Stated another way, if a high management official required employees to attend a meeting for the announced purpose of addressing a particular subject, and if during this meeting the manager made a specific statement focused on this subject, employees would be likely to regard the message as official pronouncement rather than casual dictum. A message of such gravity might well impress itself upon the listener's memory more permanently than some off–the–cuff remark.

Additionally, if the manager who spoke at a "captive audience" meeting convened specifically to oppose the Union later testified that he said very little about the Union, such testimony would not be credible. For these reasons, it is appropriate to determine whether the December 11, 2001 meeting was a "captive audience" meeting called to persuade employees to vote no.

However, it should be stressed that an employer's intention in calling a meeting is irrelevant to some other matters. Significantly, a speaker's motivation in making an allegedly coercive statement does not affect whether or not the statement itself is lawful. Rather, the Board decides whether a statement is lawful or unlawful by determining its likely effect on employees' willingness to exercise their Section 7 rights.

Additionally, whether management called a meeting to inform employees about its position on unionization or for some totally unrelated reason does not affect the General Counsel's burden of proof. In other words, the fact that an employer conducted a "captive audience" meeting before a representation election does not raise any presumption, or justify any inference, that management made unlawful statements at the meeting.

Therefore, I consider management's purpose in calling the December 11, 2001 meeting only because the employees' beliefs about the purpose of the meeting may have affected how they understood, interpreted and remembered what was said, and—more importantly in the present instance—because the purpose of the meeting is relevant to assessing Clark–Ames's credibility.

The General Counsel's witnesses agree that management called the December 11, 2001 meeting to discuss workplace safety. Nothing in the record indicates that Respondent intended the meeting to be a forum to discuss the election.

During the safety meeting, an employee raised a question about a former employee, Jason Lange, who had not received vacation pay at the time his employment ended. Many employees attending this meeting were related to Jason Lange. These employees believed that he had accrued the vacation time and that he should have been paid for it. On the other hand, management had concluded that Jason Lange had not worked the full year necessary to be eligible for vacation pay.

The discussion became animated and at some point, it segued from the subject of Jason Lange's vacation pay to the more general subject of employee benefits, and from there, to the Union. In this context, Clark–Ames told the employees that if the Union were selected, "you may have to renegotiate benefits."

If management had been intent on presenting antiunion views during a "captive audience" meeting, I would be quite skeptical of Clark–Ames' testimony that she said little about the Union. However, management had not set out to have such a "captive audience" meeting. Instead, management convened the meeting to discuss safety matters, notably forklift safety, in the wake of an OSHA inspection. In that context, mention of the Union was a digression.

Moreover, considering the hostility manifested by the employees over management's perceived treatment of Jason Lange, the atmosphere was less than ideal for a "vote no" sales pitch. Clark–Ames would have little reason to dwell on the union issue when doing so would further polarize rather than persuade.

For all of these reasons, as well as my observations of the witnesses, I credit Clark–Ames' testimony and find that she only told the employees that if the Union came in, "benefits may have to be renegotiated." Such a statement was not merely true but a truism. Whenever employees select a union, they seek to negotiate new terms of employment, often including new benefits.

Because this statement did not constitute a threat, I conclude that it did not violate the Act. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 5(o).

Complaint Paragraphs 5(q) and 5(r)

Complaint paragraph 5(q) alleges that on about December 12, 2001, Respondent, by President Porter, interrogated an employee about the employee's union sympathies by asking the employee how he would vote in the election. Complaint paragraph 5(r) alleges that during this same conversation, Porter threatened to reduce the hours of its employees because of their activities on behalf of the Union. Respondent's answer denies these allegations.

Steve Meier testified that on the day before the election, Porter "came up to me and asked me how I was voting on the Union and I told him I was voting yes. Then he asked me how we was able to—how was the employees going to afford to pay for the union dues when he kind of cut the hours down because the job was being—it was going to be slow or whatever."

Porter did not specifically deny making the comments attributed to him by Meier. Crediting this unrebutted testimony, I find that Porter did make these comments.

Applying the *Rossmore House* standards discussed above, I conclude that Porter's asking Meier how he was going to vote violated Section 8(a)(1) of the Act. The first *Rossmore House* factor concerns a history of employer hostility towards the Union. At the time Porter asked Meier how he was going to vote, Porter already had demonstrated hostility to the Union. Specifically, certain statements he made at the November 23, 2001 meeting violated Section 8(a)(1), as discussed above.

The second *Rossmore House* factor concerns the nature of the information sought. It is difficult to conclude that Porter was simply being curious when he asked Meier how he was going to vote, because Porter followed that question with a veiled threat to reduce the employees' hours. This threat cer-

tainly created the appearance that Porter was seeking information on which to base taking action against an employee.

The third *Rossmore House* factor concerns the identity of the questioner. Porter owns one–half interest in Respondent and is its president. Thus, he is the Respondent's highest ranking official.

These first three factors weigh in favor of finding the question coercive and unlawful. The remaining two *Rossmore House* factors weigh against finding a violation. Porter did not call Meier into his office or other locus of authority, but posed the question on the plant floor. Meier's reply, that he would vote for the Union, presumably was truthful.

On balance, I conclude that Porter's question violated Section 8(a)(1). When the company president asks an employee how he is going to vote in a Board–conducted election the next day, and couples that question with a veiled threat, such action clearly would interfere with, restrain and coerce an employee in the exercise of Section 7 rights.

Additionally, applying an objective standard, I conclude that Porter's rhetorical question concerning how employees would pay for the Union when he was going to cut their hours or when the job was going to be slow reasonably would be understood as a threat to reduce hours should employees select the Union. That, too, violates Section 8(a)(1) of the Act.

In sum, I find that the General Counsel has established the allegations raised in complaint paragraphs 5(q) and 5(r) and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint Paragraph 5(s)

Complaint paragraph 5(s) alleges that some time after December 13, 2001, Respondent, by President Porter, harassed and intimidated employees because they supported the Union when he approached them with a camcorder and demanded to know the name of their foreman. After summarizing the facts, I will examine them to determine (1) whether the questions Porter asked the employees violated the Act in and of themselves; (2) whether Porter violated the Act by videotaping each employee as he asked the questions; (3) whether Porter's videotaping the employees violated the Act regardless of the questions asked.

The Facts

On December 19, 2001, Respondent's President Porter turned on a camcorder and walked around the plant asking employees about recent improvements in workplace safety, such as new handrails and fire extinguishers. Porter also asked some of the employees "Who is your supervisor?" or "Who is your foreman?"

Porter did not notify the employees beforehand that he would be videotaping them, and on the tape, some appeared surprised. One employee turned away while Porter was taping and declined to participate. Porter asked the man to state his name but otherwise did not insist that he answer any questions, and the record does not indicate that he received any discipline for refusing.

There is no evidence that Porter singled out union adherents for interview. To the contrary, I find that Porter sought to interview every employee in the workplace, without regard to any employee's opinion about the Union.

Both at the end of the videotape and in his testimony at hearing, Porter explained that he made the videotape for two reasons. A recent inspection under the Occupational Safety and Health Act had turned up problems and Porter wanted to send the tape to OSHA to show that Respondent had remedied the problems and now was in compliance with that law. Porter also wanted to send a copy of the video to the Board to support Respondent's position that three employees—Calvin Lange, Jamie Lange, and Brad Meier—were supervisors. The three had cast challenged ballots in the December 13 election and their votes, if counted, could affect the outcome.

The General Counsel's Theory

Citing *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. den.344 F.2d 617 (8th Cir. 1965), the government argues that Porter's videotaping interfered with, restrained and coerced employees in violation of Section 7 of the Act. The General Counsel's brief states, in part:

> [I]n asking these questions, Porter did not tell employees the purpose of the questions, assure them that no reprisal would be taken against them depending on their answers, and tell them that participation was voluntary, that they could decline if they wished. . .Such safeguards are necessary to avoid the inherent coercion that might accompany an Employer questioning employees on matters involving Section 7 rights. *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enf den. 344 F.2d 617 (8th Cir. 1965). Moreover, the questioning must take place in an atmosphere free of employer hostility to union organizing. Id. The evidence developed at trial demonstrates that this was hardly the case.

Quite clearly, Porter did not give the assurances of voluntariness required by *Johnnie's Poultry*. Additionally, the record demonstrates at least some hostility to union organizing. Therefore, if the *Johnnie's Poultry* principle applies to this situation, the government has established a violation of the Act.

As the General Counsel's brief points out, the *Johnnie's Poultry* doctrine applies to management's questioning of employees "on matters involving Section 7 rights." Was Porter questioning employees on such matters? In addressing that issue, I will first summarize the *Johnnie's Poultry* rationale and then examine the questions Porter asked.

The Johnnie's Poultry Rationale

In *Johnnie's Poultry*, the Board articulated an exception to the general rule that a management representative may not question an employee concerning that employee's, or other employees' protected activities. The *Johnnie's Poultry* decision recognizes the need to make an exception when the employer's attorney or representative is preparing for an NLRB hearing. The exception applies only when the management representative takes certain actions to assure that the employee's cooperation is voluntary and uncoerced.

The *Johnnie's Poultry* principle applies only when asking an employee a particular question which otherwise would violate the Act. A manager certainly does not have to assure an employee that his cooperation is voluntary before asking the em-

ployee about baseball scores, the weather, or what the employee would like to eat for lunch. Because such innocuous questions have nothing to do with employees' protected activity, they do not constitute unlawful interrogation and therefore do not require an exception to the rule forbidding unlawful interrogation.

Thus, the starting point for any *Johnnie's Poultry* analysis must be determining whether asking a particular question ordinarily would constitute unlawful interrogation. If the question doesn't constitute unlawful interrogation, the whole *Johnnie's Poultry* analysis is unnecessary.

Porter's Questions

Under most circumstances, asking an employee if he favors the Union constitutes unlawful interrogation. Asking an employee how other employees feel about the Union also constitutes unlawful interrogation. Regardless of how the employee answers, the mere fact that his boss wants to know discourages his free exercise of the right to form, join, or assist a labor organization, protected by Section 7.

On the other hand, the question "Who is your supervisor?" does not seek to elicit from an employee any information concerning activities protected by Section 7 of the Act. Asking such a question, in and of itself, would not violate the Act and therefore would not raise the question of whether the *Johnnie's Poultry* exception should apply. I conclude that Porter's questions alone were not unlawful.

The Camcorder Context

That conclusion does not end the analysis. Porter did not simply ask these questions in the typical way, but posed them to employees while his camcorder was taping them. Perhaps the videotaping converted an otherwise lawful question—"Who is your supervisor?"—into unlawful interference with Section 7 rights.

In analyzing this issue, I begin by noting that an employer can interrogate an employee subtly about his union sympathies without ever coming out and asking "Do you support the Union?" For example, if an employer should ask an employee to wear an antiunion message, that response flushes out the employee's attitude about the Union just as effectively, perhaps more effectively, than a more direct question. For that reason, such a request constitutes unlawful interrogation. *Fieldcrest Cannon*, 318 NLRB 470 (1995).

Similarly, if management asks an employee to appear in a photograph or video opposing unionization, the mere request constitutes unlawful interrogation because it places the union adherent in a situation where he has to reveal his convictions or betray them. On the other hand, using an employee's likeness in such a campaign video *without* his consent also can interfere unlawfully with the employee's Section 7 rights, including the right to choose not to be involved at all in the unionization controversy.

In *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), the Board held that an employer could solicit an employee to appear in a video opposing unionization but only if the employer first gave certain assurances. In deciding upon what assurances should be required, the Board drew guidance from *Johnnie's Poultry*, above, and from *Struksnes Construction Co.*, 165 NLRB 1062 (1967), which required such assurances when questioning employees in different contexts. (As noted above, *Johnnie's Poultry* concerned interrogation by an employer representative preparing for a hearing. *Struksnes* concerned an employer conducting a poll of employees to determine a union's majority status.)

Specifically, in *Allegheny Ludlum*, the Board held that an employer lawfully may solicit employees to appear in a campaign video if each of the following requirements is satisfied:

> 1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee's picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards of benefits.
> 2. Employees are not pressured into making the decision in the presence of a supervisor.
> 3.There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video.
> 4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.
> 5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

If the video Porter made on December 19, 2001 is a "campaign video," these criteria must be applied. In that case, the way Porter made the video clearly failed to satisfy these standards and therefore violated Section 8(a)(1) of the Act.

However, I do not conclude that Porter's video was a campaign video. He did not make it to show employees to influence their votes in the election. In fact, he made the video after the election.

Also, the video did not take any position on unionization, either for or against. On the tape, Porter did refer to the recent election in explaining why [he] made the tape and wanted to send it to the Board. However, he took no position, for or against, concerning how employees should vote.

Therefore, I conclude that the tape is not a "campaign video" requiring the *Allegheny–Ludlum* assurances. But even if it is considered to be a campaign video, I conclude that it falls within another category discussed in the *Allegheny–Ludlum* decision, namely, videos which do not convey the message that those appearing on the tape opposed the Union. The Board majority wrote:

> We turn next to the second question presented by the court's remand: whether, and under what circumstances, may an employer who has *not* solicited employees to participate in a campaign videotape nevertheless use their images in the videotape without incurring Section 8(a)(1) liability . . . [W]e hold that an employer may do so only if the employer observes safeguards designed to insure that the videotape, viewed as a whole, does not convey the message that the em-

> ployees depicted therein either support or oppose union representation.
>
> Without doubt, Porter's videotape does not suggest that the employees on the tape either support or oppose unionization. Porter does not ask them any question about unionization. If the tape makes any statements at all, they are "Look, we've fixed the OSHA problems" and "_____ is my supervisor." Because the videotape does not convey the message that any employee supports or opposes the Union, making it did not, under *Allegheny–Ludlum*, violate the Act.

Another Possible Theory of Violation

Might there be some other legal theory under which Porter's videotaping would violate Section 8(a)(1)? Although the General Counsel's brief does not cite *Grandview Health Care Center*, 332 NLRB 347 (2000), it may be instructive to examine whether that precedent suggests a different basis for a conclusion that Porter's videotaping interfered with, restrained or coerced employees in the exercise of Section 7 rights.

Essentially, such a theory would be based on the principle that in the context of a labor dispute, an employee's refusal to carry out an assignment may be protected by law, even though it would constitute insubordination in other circumstances. For example, a truck driver typically has a duty to make an assigned delivery. However, the law may protect his refusal to cross a picket line. Although the driver made an individual decision to honor the picket line, he is acting in concert with the employees who established it. Thus, the driver's individual decision to cross a picket line, like an individual employee's decision to join the strike, constitutes concerted activity within the contemplation of the Act.

The same principle may be applied to an individual employee's refusal to answer a supervisor's work–related question. Obviously, an employee ordinarily has a duty to answer such work–related questions. However, a refusal to answer such a question, like the driver's refusal to cross a picket line, may be protected in the special circumstances of a labor dispute.

But what is a "labor dispute"? The Board defines the term to encompass more than a strike or picket line. Under the Board's definition, a grievance proceeding under a collective–bargaining agreement is a "labor dispute." Thus, in *Grandview Health Care Center*, 332 NLRB 347 (2000), the Board, citing *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied 648 F.2d 712 (D.C. Cir. 1981), stated that

> [W]hile an employer may lawfully question employees in an investigation prior to discipline, it may not compel an employee to answer questions once disciplinary action is taken, the grievance machinery is activated, and the dispute is to be submitted to arbitration . . . an employee has a Section 7 right to refuse to cooperate in building a case against a fellow employee once discipline is imposed and an actual labor dispute is underway through resort to arbitration.

The Board has also held that an unfair labor practice investigation is a "labor dispute." Therefore, an employee's refusal to cooperate with management during such an investigation constitutes protected activity.

In *Grandview Health Care Center*, the Board found unlawful the employer's rule prohibiting an employee from "[r]efusing to cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation of company rules, laws, or government regulations." The Board explained that:

> By compelling employees to cooperate in unfair labor practice investigations, or risk discipline, the Respondent's rule violates the longstanding principle, established in *Johnnie's Poultry*, that employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union. If the employees' Section 7 right of mutual protection is to be safeguarded, cooperation must be voluntary. Failure to inform employees of the voluntary nature of the employer's investigation is "a clear violation" of Section 8(a)(1) of the Act. *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 861 (6th Cir. 1990).

When Porter made the December 19, 2001 videotape, no unfair labor practice charge had yet been filed, but a representation petition had been filed and remained pending. Moreover, when he asked employees questions on videotape, he was gathering evidence to send to the Board on the issue of certain voters' supervisory status.

Porter did not use any threat of disciplinary action to compel employees to answer his questions while the camera was rolling. On the other hand, he asked the questions without giving the employees any assurances that they did not have to answer and that no adverse consequence would result from a refusal to answer. To determine whether Porter thereby violated the Act under a *Grandview Health Care Facility* theory, I will examine that case in further detail.

A portion of the *Grandview Health Care Center* decision quoted above can be read in two separate ways. Each of these interpretations leads to a different result. Therefore, it is important to examine the language carefully. The Board stated, in pertinent part that:

> employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union.

One possible interpretation is that the Board is referring *only* to a particular subset of interrogations relating to Section 7 activity, namely, those interrogations relating to Section 7 activity which *also* reasonably tend to coerce an employee into making a statement adverse to Section 7 interests. In other words, the Board is stating two criteria in the conjunctive, namely, that the rule applies only to an interrogation that (1) relates to Section 7 activity *and also* (2) reasonably tends to coerce the employee into making statements adverse to the Section 7 interests of himself, other employees, or the union.

Here is the other possible interpretation: The language quoted above may be describing two different sets of questions, either of which might not be asked without first giving assur-

ances. In other words, this second interpretation would read the two phrases in the disjunctive.

Under this second interpretation, the first set would include questions relating to Section 7 activity. The second set would include questions (even questions facially unrelated to Sec. 7 activity) which would reasonably tend to coerce an employee into making a statement adverse to someone's Section 7 interests. If the question fell into either category, it would be unlawful unless preceded by appropriate assurances.

This second interpretation could lead to some rather extreme results. For example, suppose that a machine had to be turned off at the end of a shift but was not, resulting in damage. Suppose further that the employer disciplined employee Smith, who usually turned the machine off, and that Smith filed a grievance stating "I did not turn off the machine because employee Jones told me he would turn it off." Investigating this grievance, the supervisor asks Jones, "Did you tell Smith you would turn off the machine?"

Were I to apply the second interpretation to this hypothetical situation, I would have to conclude that the supervisor must first inform Jones that he did not have to answer the question, and if the supervisor did not give such assurance, the employer would be engaging in an unlawful interrogation.

Stated another way, because a grievance had been filed over a disciplinary action there was a "labor dispute," and in that circumstance, Jones could not be asked any question about the facts leading up to the discipline without first being advised of his right to remain silent. Such an outcome is so extreme I doubt that the Board would have intended it.

Therefore, I conclude that the first interpretation is correct. In other words, if a question does not inquire into the exercise of Section 7 rights then an employer does not have to precede the question with assurances of voluntariness. Applying this interpretation, I further conclude that Porter did not violate the Act simply by asking employees "Who is your supervisor?" or "Who is your foreman?" because neither of these questions inquires into the exercise of Section 7 rights.

In sum, *Grandview Health Care Center* does not provide a basis for concluding that Porter's videotaping violated the Act. Neither do the other rationales discussed above. Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraph 5(s).

Complaint Paragraph 5(t), 5(u) and 5(v)

Complaint paragraph 5(t) alleges that on about December 27, 2001, Respondent, by its President and owner Porter, at Respondent's Pocahontas facility, threatened an employee that representation by the Union would be futile when he said there would be no "damn" union in his plant. Complaint paragraph 5(u) alleges that during this same conversation, Porter threatened an employee by saying that he had discharged three employees because of their support for the Union. Complaint paragraph 5(v) alleges that during this same conversation, Porter threatened an employee that employees would no longer be able to move from job to job as they had in the past if they selected the Union to be their representative. Respondent denies these allegations.

A more complete description of the circumstances surrounding this allegation may be found later in this decision, in connection with the discussion of complaint paragraph 6(b). In brief, the facts may be summarized as follows. On December 24, 2001, Respondent discharged Calvin Lange, Jamie Lange, and Donald Meier. The two Langes are sons of Jim (or "Jimmy") Lange. Donald Meier is Jim Lange's stepson.

On December 27, 2001, Jim Lange was working at a machine called a hone, which grinds liners used in pumps. The machine accomplishes this task only when pressure has been applied to the grinding wheel. Otherwise, the wheel spins unproductively.

Porter became concerned that Jim Lange was taking too long to hone a liner. After examining the machine, Porter concluded that Lange had been going through the motions of honing a liner without putting pressure on the grinding wheel, and thus was pretending to work but accomplishing nothing. Porter confronted Lange at his machine on December 27, 2001.

According to Lange, during this conversation Porter said "I told you guys the damn union is not coming in here." (Allegation in complaint paragraph 5(t)) Jim Lange further quoted Porter as saving that he had gotten rid of Calvin Lange, Jamie Lange, and Donald Meier because they were the leaders of the campaign to bring in the Union. (Allegation in complaint paragraph 5(u))

Further, Jim Lange testified that Porter said that if the Union got into the plant, employees would only have certain jobs and that Porter couldn't pull them off those tasks to do something else. (Complaint paragraph 5(v)) Porter specifically denied making these statements.

As discussed below in connection with complaint paragraph 6(b), based in substantial measure on my observations of the witnesses, I credit Porter's testimony and discredit Lange's. I find that Lange deliberately was slowing production by pretending to work without accomplishing anything. His motive for this deception—anger over Porter's discharge of two sons and a stepson—also may have affected Lange's testimony at trial.

Falsely testifying that Porter made the alleged violative statements would serve the same purpose as misleadingly pretending to work; it provided a method of getting even with Porter for the discharge of Lange's sons and stepson. Moreover, attributing to Porter an admission that he discharged these individuals because of their union activities would serve not only a desire for revenge but also Lange's desire to help his sons and stepson regain their employment.

As discussed below, I conclude that Porter did unlawfully discharge two of the three men and that the discharge of the third individual, Calvin Lange, would have been unlawful but for his supervisory status. Notwithstanding my findings that the terminations of Jamie Lange and Donald Meier violated the Act, I do not find that Porter made any admission to Jim Lange concerning these discharges.

To the contrary, I find that Porter did not make any of the allegedly violative statements which Lange attributed to him. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraphs 5(t), 5(u) and 5(v).

Complaint Paragraphs 5(w), 5(x) and 5(y)

Complaint paragraph 5(w) alleges that on about January 2, 2002, Respondent, by Porter, threatened employees that they would be discharged because of their support for the Union. Complaint paragraph 5(x) alleges that during this same conversation, Porter threatened employees that he had discharged three named employees because of their support for the Union. Complaint paragraph 5(y) alleges that during this same conversation, Porter threatened employees that representation by the Union would be futile when he told them there would be no union in his plant, no matter what. Respondent's answer denies these allegations.

Employee Steve Meier testified that on January 2, 2002, while he and Brad Meier were at work getting parts, Porter came up to him and asked what they were doing. According to Meier, he told Porter that he was getting parts for a pump, and Porter then "started complaining about how much it was costing him for the lawyers and—because of the Union and everything else and told me and Brad that he got rid of Donnie, Calvin, Jamie, and Jim because of the Union. If we don't behave or watch out, whatever, that we'd be the next ones gone." Additionally, Meier testified, Porter said that "the Union wasn't coming in no matter what."

Brad Meier's account was similar but more abbreviated. He testified that he and Steve Meier were getting parts when Porter came up and asked what they were doing. Brad Meier further testified:

> We told him that we were getting parts or I was helping Steve get parts and then he started complaining about how much money it was costing him for his lawyers and how much paperwork his daughter Michelle had to do, and then he said—told us that if we didn't straighten up that we'd be the next ones just like Calvin and Jamie and Don and Jim because the union is not coming in here.

Porter denied making the comments which the Meiers attributed to him. Based on my observations of the witnesses, I credit Porter and find that he did not make the alleged statements.

At the time of this encounter, nearly 3 weeks after the election, Porter already had been advised by counsel and well knew that it was unlawful to make threats. Indeed, at his point Respondent had received the initial unfair labor practice charge, so Porter was aware that if he made unlawful statements, he would have to answer for them during the Board investigation. Porter understood the things he should not do.

Human beings, of course, have a long history of disregarding a prohibition and its consequences and eating the forbidden fruit anyway. However, when someone breaks a known rule and risks the attendant punishment, he usually has a reason for doing so. The impetus for breaking the rule may arise from a cold calculation that the benefit to be gained is worth the price to be paid. The motive also may arise in anger or some other strong emotion which overcomes prudence. But either way, there is still a motive.

No evidence suggests a motive for Porter to make the statements attributed to him. On January 2, 2002, the election had been over for almost 3 weeks. Porter could not obtain the Meiers' votes by threatening them. Moreover, Respondent had filed objections to conduct affecting the election and these objections were pending before the Board. Such added government scrutiny certainly would increase the risk of detection of an unfair labor practice. Thus, the benefits of making a threat were minimal and the possibility of adverse consequence was great. At a rational level, Porter had no reason to make the alleged statements.

Therefore, if Porter did make the comments attributed to him, his motivation must have been emotional. However, the record suggests no reason why Porter would approach the two employees on this occasion and bring up the subject of the Union "out of the blue." Emotions, when aroused, certainly can overcome caution, but there is no evidence that on this occasion any particular event or remark had provided such a wake–up call.

In sum, my observations of the witnesses persuade me that Porter's testimony was reliable, and the events described by Steve and Brad Meiers appear rather implausible. For these reasons, I credit Porter and find that he did not make the statements the Meiers attributed to him. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraphs 5(w), 5(x) and 5(y) of the complaint.

Complaint Paragraph 6(a)

Complaint paragraph 6(a) alleges that on about December 24, 2001, Respondent discharged its employees Calvin Lange, Jamie Lange, and Donald Meier, Jr., which Respondent admits. Paragraph 6(d) of the complaint, as amended, alleges Respondent engaged in this conduct because Calvin Lange, Jamie Lange, and Donald Meier, Jr., engaged in protected union and concerted activities. Respondent denies this alleged unlawful motivation.

Someone who meets the statutory definition of "supervisor" is not an "employee" within the meaning of the Act. Except in extraordinary circumstances not present here, the discharge of a supervisor does not violate the Act. For the reasons discussed above, I have concluded that at all material times, Calvin Lange was a statutory supervisor. Therefore, I recommend that the Board dismiss the allegations that Respondent's discharge of Calvin Lange violated Sections 8(a)(1) and (3) of the Act.

Should the Board conclude that Calvin Lange is an "employee," rather than a "supervisor," it would become necessary to determine whether Respondent lawfully discharged him. Therefore, for purposes of the analysis discussed below, I will consider him to be an "employee."

In evaluating the evidence, I will follow the framework which the Board set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the

employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

With respect to the first *Wright Line* element, the record establishes that Calvin Lange, Jamie Lange, and Donald Meier all signed union authorization cards and talked with other employees about the Union. I conclude that the government has established the first *Wright Line* element.

With respect to the second *Wright Line* element, Respondent's president Porter's testimony establishes that he knew that Calvin Lange, Jamie Lange, and Donald Meier were advocating that employees support the Union. This testimony will be discussed further below. I conclude that the government has established the second *Wright Line* element.

Clearly, the General Counsel has established the third *Wright Line* element. Respondent admittedly discharged Calvin Lange, Jamie Lange, and Donald Meier and such discharges are adverse employment actions.

Finally, the government must establish a connection between the alleged discriminatees' protected activities and the adverse employment action. In this instance, Porter testified that Calvin Lange told him that he had brought in the Union to punish Porter's daughter, Michelle. His testimony continues as follows:

> Q. And how did you react to that?
> A. I was very irritated about that. I couldn't believe that my most entrusted employees would do this.
> Q. All right. Would do what?
> A. Would bring in the union thing to punish Michelle.
> Q. Was it the union thing that bothered you or was it their actions toward your child?
> A. It was their actions about punishing Michelle and I couldn't see that Michelle had ever done anything to these people to—why they would want to punish her . . . I just didn't understand why they were doing this. But they explained it to me why they were doing it.
> Q. And why was that?
> A. Well, they said—they said they didn't have any complaint with me . . . It was Michelle that they was punishing and I asked him—I said "What did Michelle do to you?" Well, she comes out here and tells us to do this and tells us to do that and then she just makes these terrible faces, and I said "Well, did that do serious harm to you making them faces, you know?" I said "When you are upset about things you always make some kind of faces." I do myself.
>
> And so I made up my mind right then that I was going to fire them and so we just broke up the meeting. There was no sense in talking with them guys any more because they had told me that they wasn't going to change their attitudes.
>
> Q. And what attitude was it that you had a problem with?
> A. On Jamie he just—he just really had a bad attitude and he said—he said at the meeting—he said "Well, I ain't going to change my attitude."
> Q. What attitude was it?
> A. Well, just a nasty attitude. He didn't want to talk to anybody. He—you know, how can we converse with him if he don't want to talk to us.

In further testimony, elicited on direct examination by Respondent's counsel, Porter stated that there were two reasons why he discharged Calvin Lange, Jamie Lange, and Donald Meier. The main reason, he said, was because they "terrorized" another employee. By "terrorize," Porter clearly was referring to Calvin Lange's comment to John Lyon, threatening him with a "blanket party" if Lyon did not support the Union. Thus, Porter explained, "I just can't tolerate people in there trying to infringe on people's civil rights and not allow them to vote however they want to."

Porter testified he had a second reason for firing the three, namely, their attempt to "punish" his daughter Michelle by bringing in the Union. Porter testified

> Q. Mr. Porter, would it have made any difference to you if they were doing these things because of the union or for some other reason?
> A. If they do it for any reason.

Although that testimony is not entirely clear, I understand it to mean that Porter would have discharged the three men for trying to "punish" his daughter regardless of the method the men had chosen for inflicting the "punishment." Presumably, Porter would have felt the same motivation to discharge the men even if they had expressed this desire by some action wholly unrelated to the Union.

Porter's testimony establishes a sufficient nexus to satisfy the fourth *Wright Line* element. It would split hairs too finely to find that in making the discharge decision, Porter did not take into account the protected activities of the three men, but only their motivation for engaging in such activities. Recognizing such a distinction would not effectuate the purposes of the Act, which protects the rights of employees to form, join or assist labor organizations without regard to their reasons for doing so. Under the law, employees' rights to engage in union activity do not depend on whether their hearts are pure.

By proving all four *Wright Line* elements, the General Counsel has, in effect, raised a presumption that the discharges were unlawful. Respondent may rebut this presumption by showing that it would have discharged the men even in the absence of protected activity. In assessing whether a respondent has carried this burden, the Board does not rely on its views of what conduct should merit discharge. "Rather," the Board has stated, "we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline." *Lampi LLC*, 327 NLRB 222, 223 (1998).

Respondent has not provided the kind of particularized documentary evidence contemplated by the Board in *Lampi LLC*. That may be understandable, considering that Respondent is a relatively small employer operating without the pa-

perwork which exists in larger companies. However, Respondent also has not offered testimony to establish instances when it discharged other employees for similar reasons.

During the November 23, 2001 meeting, Porter did say he discharged a former employee named Mark because he went around intimidating other employees. Evidence concerning this discharge could be quite relevant to Respondent's defense. For example, if this employee's conduct had been similar to, or no worse than the conduct of Calvin Lange, Jamie Lange, and Donald Meier, and if this employee had not engaged in any protected activity, then the discharge of the employee would support a finding that Respondent would have taken similar action against the three men even in the absence of union activity.

The record, however, provides little information about Mark. No evidence allows a meaningful comparison of Mark's conduct with that of Calvin Lange, Jamie Lange, and Donald Meier. Apart from Porter's comment to these men during the November 23, 2001 meeting, there is no basis to conclude either that an employee named Mark went around intimidating other workers or that Respondent discharged him for this reason. We don't even know Mark's last name.

In a company with a small employee complement, infractions prompting discharge do not happen every day. An employer's ability to mount a successful *Wright Line* defense does not depend on proof that another employee committed exactly the same offense and got exactly the same discipline

For example, suppose Employee X stole his employer's truck and rolled it into the river. No other employee had ever done so, making it impossible for the employer to prove that it *always* discharged an employee who stole a truck and rolled it into the river. Must the Board conclude that this employer has failed to present the evidence needed to carry its rebuttal burden? Of course not. The Board certainly may consider other evidence concerning the likelihood that an employee would be terminated for certain conduct even though the alleged discriminatee was the first member of a respondent's work force to engage in this specific conduct.

Although the Board does not substitute its judgment for that of the employer in deciding which offenses warrant discharge, it still may take notice of what types of infractions commonly lead to the termination of employment in a particular industry. Indeed, Congress created the Board as an agency with particular expertise in labor relations. The Board may draw upon its experience in weighing an argument that a particular offense was so severe it always would result in discharge.

Here, the conduct does not appear to be so egregious that most employers would react almost automatically by issuing discharge notices. In these circumstances, where the offending conduct does not fall outside any obvious industry norms, Respondent's rebuttal evidence must be detailed enough to show how much the offending conduct transgressed its own standards, if not the industry's. The evidence here falls short.

In sum, I conclude that Respondent has not established that it would have discharged Calvin Lange, Jamie Lange, and Donald Meier Jr. even in the absence of protected activity. I recommend that the Board find that Respondent's discharge of Jamie Lange and Donald Meier Jr. violated Sections 8(a)(3) and (1) of the Act.

Additionally, but for my finding that Calvin Lange is a supervisor within the meaning of Section 2(11) of the Act, I would recommend that the Board find that his discharge violated Sections 8(a)(3) and (1) of the Act. However, because I conclude that he is a supervisor, I recommend that the Board dismiss the allegations regarding the discharge of Calvin Lange.

Complaint Paragraph 6(b)

Complaint paragraph 6(b) alleges that on about December 28, 2001, Respondent discharged its employee Jimmy Lange. Respondent's original answer admitted this allegation.

Thereafter, the General Counsel issued an amendment to the complaint which resulted in Respondent amending its answer. In this amendment, Respondent again admitted the allegation raised by complaint paragraph 6(b). However, it appears that Respondent did not intend to make this admission. At the hearing, Respondent's counsel consistently maintained that Respondent had not discharged Lange. For example, in her opening statement, Respondent's counsel stated "We believe that Mr. Lange was not fired at all." Similarly, in its posthearing brief, Respondent took the position that it had not discharged Jimmy Lange.

As discussed below, clear evidence establishes that Respondent did not discharge Jimmy Lange. In these circumstances, I conclude that Respondent did not intend to admit in its answer that it discharged Lange and that the admissions on this issue in its answer and amendment to answer are inadvertent. Moreover, even were I to accept these admissions at face value, I would still be compelled to find that Respondent did not discharge Lange because any other finding would be contrary to the great weight of the evidence. The facts are as follows.

Not only is Jimmy Lange the father of Calvin and Jamie Lange and the stepfather of Donald Meier Jr., he was also the father of the union organizing drive. That campaign began when Lange, dissatisfied with working conditions, discussed the matter with other employees and then met with the Charging Party's business manager, Dick Kraus. Later, Jimmy Lange took union authorization cards to work and gave them to other employees.

Lange's last day at work was December 28, 2001. On that day, Porter came to Lange's workstation, where he was operating a machine called a hone. This machine uses a moving "stone" to grind liners under pressure, but the operator must apply the correct amount of pressure for the particular task.

Both Lange and Porter agree that Porter accused Lange, essentially, of going through the motions of honing a liner without applying the pressure needed to accomplish the work. Contrary to Porter, however, Lange insists that he was, in fact, applying the correct pressure, rather than faking it.

Both Lange and Porter also agree that Porter told Lange to shut the machine down and go home. Both also agree that Lange asked Porter, "Are you firing me?" Both also agree that Porter replied that he was not firing Lange. Similarly, both agree that Porter told Lange that when he wanted to work he

could come back to work. Thus, Lange testified as follows on cross–examination by Respondent's counsel:

> Q. Did Mr. Porter tell you you were not being fired?
> A. es, he did.
> Q. Did Mr. Porter tell you when you wanted to work you could come back?
> A. Yes, he did.

Lange left the premises and, by his own admission, never returned to work. Lange also admitted that he never attempted to come back to work, and never told Porter again that he wanted to work.

Lange testified that he believed he had been fired because he received a telephone call from another individual who quoted a woman who worked at a body shop as saying that one of Respondent's foremen told her that Lange had been fired. According to Lange, he never sought to work for Respondent again because of this belief.

Lange's explanation strains credulity. No reasonable person, having been told by the boss that he could return when he was ready to work, would then accept a third–hand statement to the contrary as dispositive. It does not take the experience of a trial lawyer to realize that hearsay upon hearsay is not particularly reliable.

Although Lange testified that he was putting appropriate pressure on the hone—in other words, not faking work—I do not credit that testimony. As a witness, Lange was not particularly persuasive because, on occasion, he sidestepped the question, as illustrated by the following example:

> Q. Did you ever tell Mr. Porter again that you wanted to work there?
> A. When he told me to get my stuff and leave I was fired.

This testimony raises doubts about Lange's credibility because it is nonresponsive and because it supplies a conclusion rather than a fact. Moreover, the conclusion itself is hardly consistent with Lange's admission that Porter told him he was *not* being fired.

Additionally, Lange had an apparent motive to go through the motions of working without producing any results. Four days before this incident, Porter had discharged two of Lange's sons and his stepson. Moreover, Porter had done so the day before Christmas. In all likelihood, Lange was, if not boiling mad, at least simmering.

For these reasons, I reject Lange's testimony to the extent it contradicts Porter's. Moreover, I find that Lange was, in fact, pretending to work on December 28, 2001 without intending to produce any result.

Applying the *Wright Line* analysis, I find that Lange engaged in ample protected activity. Therefore, I conclude that the government has established the first *Wright Line* element.

The record is less clear that Respondent knew about Lange's efforts, but for analysis I will assume that to be the case. Therefore, I conclude that the General Counsel has established the second *Wright Line* element.

However, the government has not established the third *Wright Line* element, which requires proof that an adverse employment action had taken place. By Lange's own admission, Porter told him that he was not fired. By Lange's own admission, Porter told him he could come back when he was ready to work. By Lange's own admission, he never tried to come back to work.

In these circumstances, it is clear that Respondent did not discharge Lange. Therefore, I conclude that no adverse employment action took place.

Because the General Counsel has not established all four *Wright Line* elements, I recommend that the Board dismiss the allegations set forth in complaint paragraph 6(b).

Complaint Paragraph 6(c)

Paragraph 6(c) of the complaint, as amended, alleges that on about April 3, 2002, Respondent discharged employee Brad Meier. Paragraph 6(d) of the complaint, as amended, alleges Respondent engaged in this conduct because Meier engaged in protected union and concerted activities. Respondent denies these allegations.

Brad Meier began work for Respondent in July 1995 and worked in the shipping department. When the union organizing campaign began in the fall of 2001, Meier signed a card, attended some union meetings, and took another employee to meet the Union's business manager at a restaurant. Additionally, Brad Meier was present when Donald Meier asked employee John Lyon if Lyon were going to join the Union.

Brad Meier testified that on April 3, 2002, he was working, putting some valves together, when "my supervisor or my foreman, Tom Merihart, came back and told me . . . to go and get a torque wrench and torque them valves so then I went across the street and then I went in the other building and I went and asked Jim Barrett where the torque wrench was."

According to Meier, after he got the torque wrench he started back across the street when John Lyon began yelling at him. At this time, Lyon was a foreman. Meier quoted Lyon as saying, among other things, "You better not break that fucking torque wrench and bring that fucking torque wrench back as soon as you are done with it." Meier testified that in response, "I flipped him off and then I went back across the street and went back to work."

Lyon's version of this encounter is quite different. Lyon denied that he yelled or swore at Meier, adding that he had no reason to do either. Lyon testified that he told Meier to make sure he brought the torque wrench back "not being broke." He explained that in the past, torque wrenches had gotten broken.

In response, according to Lyon, Meier started swearing at him and accused him of getting Calvin Lange, Jamie Lange, and Donald Meier fired because he was a "backstabber." Lyon testified he was "kind of stunned" and asked Meier what he meant, to which Meier answered, "You'll see. It ain't over yet." Meier then made a vulgar gesture with his finger.

Although Lyon and Meier agree that Meier made this vulgar gesture, their testimony diverges on every other detail. Therefore, I must decide which testimony is more reliable.

If I accept Meier's testimony, I must conclude that Lyon, for no apparent reason, began swearing at Meier. If I credit Lyon's testimony I must conclude that Meier, for no apparent reason, began swearing at Lyon. Absent further information, not ap-

parent from the record, neither version seems particularly likely.

The record does indicate that Meier had a more volatile personality. For example, another employee, Julie Reynolds, testified about an encounter she had with Meier in late December 2001 or early January 2002. Michelle Clark–Ames had instructed Reynolds to find out who had parked in the spot used by Porter. She began asking employees and when Meier acknowledged that it was his car, she told him, "Well, you are supposed to move it." According to Reynolds, when she replied "Michelle," Meier asked "Where in the fuck am I supposed to park it."

Meier then went to Clark–Ames. Reynolds testified she overheard Meier "cussing at Michelle." This incident suggests that Meier could "fly off the handle" with slight provocation. The record does not indicate that Lyon had a similar tendency. Thus, it would appear more likely that during the April 3, 2002 encounter, it was Meier who erupted.

Moreover, my observations of the witnesses lead me to credit Lyon. Therefore, I find that Meier swore at Lyon. Additionally, consistent with the testimony of both witnesses, I find that Meier directed a vulgar gesture towards Lyon.

Later that same day, Clark–Ames called Brad Meier into the office and gave him a termination notice. That notice, signed by Clark–Ames and Porter, stated in part as follows:

> Brad Meier, called John Lyon name and flipped him off. We consider this a act of belligerence toward a foreman, which was stated in the rules and during company meetings that this kind of behavior will not be tolerated.

In considering the lawfulness of this discharge, I apply the *Wright Line* standards discussed above. Clearly, the government has established the first *Wright Line* element. Brad Meier signed a union card, attended union meetings, and took an employee to see a union official.

Second, the General Counsel must prove that management knew about Brad Meier's protected activities. Although the evidence does not establish that Respondent specifically knew of Brad Meier's protected activities, summarized above, management had reason to identify him as a union supporter. Brad Meier was present when Donald Meier asked John Lyon if Lyon were going to join the union. The evidence suggests that Lyon reported this conversation to management.

Brad Meier and Donald Meier also were relatives. Brad Meier's presence when Donald Meier asked Lyon about supporting the Union, together with the familial relationship reasonably would create at least the impression that both shared pro–union views. Although the record does not present exceptionally strong evidence that Respondent knew about Brad Meier's protected activities, I conclude that the evidence is sufficient to satisfy the second *Wright Line* element.

The third *Wright Line* criterion concerns the existence of an adverse employment action. Without doubt, discharge constitutes an adverse employment action.

Finally, the General Counsel must establish a link between Brad Meier's protected activity and Respondent's decision to discharge him. Respondent's unlawful termination of Jamie Lange and Donald Meier on December 24, 2001 certainly calls into question Respondent's motivation in later discharging Brad Meier. Additionally, as discussed above, Respondent's president made a number of statements, violating Section 8(a)(1) of the Act, which demonstrated some hostility towards the union organizing campaign.

It may be noted that the violative statements do not specifically indicate that management identified Brad Meier with this activity. Likewise, they do not show that Porter singled out Brad Meier for disciplinary action either because of the union organizing drive or because of Meier's protected activities. Therefore, I will look further to determine whether other evidence suggests that Respondent bore a particular hostility *toward Brad Meier* because of Meier's union activities or the protected activities of other employees.

In some instances, the timing of a discharge may support an inference that an employer took the discharged employee's union activity into account when making the decision to fire him. For example, if management terminated a worker promptly after learning that the worker supported the Union, it would be reasonable to conclude that this newly–acquired knowledge precipitated the discharge.

The record here, however, does not indicate that management learned about Brad Meier's protected activities immediately before the discharge. Moreover, Meier's discharge occurred more than 3 months after the representation election. A connection between Meier's campaigning for the union and his later discharge cannot reasonably be inferred from the timing alone.

The April 3, 2002 letter memorializing Brad Meier's discharge cited two acts which prompted the termination of his employment: Meier had called Lyon a name and had "flipped him off." The letter, signed by President Porter and Vice President Clark–Ames, explained "We consider this a[n] act of belligerence toward a foreman . . ."

If the epithet which Meier applied to Lyon had some well–recognized antiunion connotation—for example, a term such as "scab"—then Meier's use of such term arguably might constitute protected activity. If so, then Respondent would have considered Meier's protected activity in making the decision to discharge him. However, Meier did not call Lyon a "scab." He called him a "backstabber."

Standing alone, this term does not suggest union or other protected activity. Even in the context of prior events, it does not carry this connotation.

The record suggests that Meier used this epithet because he believed Lyon had complained to management about the actions of Calvin Lange, Jamie Lange, and Donald Meier, and that Lyon's complaints had resulted in the discharge of these three men.

As noted above, Calvin Lange, accompanied by Donald Meier, had threatened to beat Lyon up (by giving him a "blanket party") if Lyon did not support the Union. Lyon reported this threat to management and on November 23, 2001, Owner Porter cautioned Calvin Lange, Jamie Lange, and Donald Meier not to threaten employees. Nonetheless, the three men sought out Lyon that same evening, and Calvin Lange falsely stated that he, Lange, had been fired. It appears that Brad Meier believed that Lyon had complained to management about this

encounter and that Lyon's complaint led to the discharge of the three men.

These incidents do not constitute protected activity. Calvin Lange's specific "blanket party" threat is not protected. Moreover, the record does not establish that the three men engaged in any protected activity when they met up with Lyon on the night of November 23, 2001. In this context, when Brad Meier's called Lyon a "backstabber," the term reasonably would not be understood to describe opposition to the Union.

Therefore, and regardless of whether calling someone a "scab" might constitute protected activity in certain circumstances, a question not presented here, Meier was not engaged in protected activity when he called Lyon a "backstabber." Respondent's explanation, that it discharged Meier for calling directing a derisive name and vulgar gesture towards Lyon, does not, on its face, suggest a connection between Meier's protected activity and the discharge decision.

Nonetheless, I conclude that Respondent's violations of Section 8(a)(1), and Respondent's unlawful discharges of Jamie Lange and Donald Meier, discussed above, are sufficient to carry the General Counsel's burden of showing a connection between protected activity and the decision to terminate Brad Meier. At the fourth step of the *Wright Line* analysis, the government does not have to show proximate causation; it does not have to prove that but for the unlawful motivation, a respondent would not have taken the adverse employment action. The General Counsel merely has to establish that some connection exists between the protected activity and the adverse employment action.

Although the record clearly falls short of satisfying a "but for" standard, it does suffice to demonstrate some kind of link between the protected activity and the adverse employment action. Therefore, I conclude that the General Counsel has established the fourth *Wright Line* element.

Because the General Counsel has established all four *Wright Line* elements, the burden shifts to Respondent to prove that it would have discharged Brad Meier in any event, even in the absence of any protected activity. As discussed above, the Board does not rely on its own views about what conduct should merit discharge but looks to a respondent's own documentation regarding the alleged discriminatee's conduct, to the respondent's personnel policy handbook, and to evidence of how the respondent treated other employees with recorded incidents of discipline. *Lampi, LLC*, 327 NLRB 222 (1998).

In applying these standards, it is appropriate to note that the thoroughness of an employer's record keeping is somewhat proportional to the employer's size. Typically, a company with thousands of workers will keep detailed personnel records. Such a large company almost invariably maintains a human resources department staffed by professionals with substantial training in labor relations. These specialists understand the value of documentation, know how to prepare it, and often teach these record–keeping skills to line supervisors.

On the other hand, a small company, such as the Respondent in this case, does not have a separate human resources department or a labor relations staff. Typically, such a small company keeps fewer records and many of those records are not as thorough as those kept at big companies.

This difference does not change an employer's burden of proof in rebutting the General Counsel's case. That burden is the same regardless of the size of the employer. However, the difference does affect the way documentary evidence should be interpreted.

For example, assume that the human resources manager of a large company testified that management had treated the alleged discriminatee exactly the same as it had treated other employees who had committed a similar infraction. Further assume that this large company kept meticulous records but failed to support the manager's testimony with documentation. Quite properly, the judge might be skeptical of such testimony. However, if the respondent were a small company which kept fewer records and had no human resources staff, the absence of corroborating documents would not raise the same level of suspicion.

A small company could suffer another disadvantage, compared to a large employer, in meeting the rebuttal burden. Among a work force of thousands, it is likely that someone, other than the alleged discriminatee, had committed the same offense. The large employer therefore could point to this prior experience to show that it had not treated the alleged discriminatee more harshly because of his union activities.

In a small company, it is much less likely that two employees have committed exactly the same infraction. The small employer may have great difficulty showing that it previously had treated a similar situation in the same way because no employee had engaged in such behavior in the past. Therefore, the size of the employer needs to be considered in weighing a respondent's rebuttal evidence.

The record suggests that during his first 6 years of employment with Respondent, Brad Meier's work was satisfactory. Beginning in late December 2001, problems began developing. Before his discharge, Meier received two other disciplinary warnings. Meier did not deny the conduct which prompted the warnings. However, I must determine whether the three instances of improper conduct would have caused Respondent to discharge Meier in any event, regardless of union and other protected activities.

The first incident occurred on December 27, 2001. Shortly before this date, Respondent had fired Jamie Lange, who had been Brad Meier's "foreman," that is, the person who kept Meier busy and answered his questions. After Jamie Lange's discharge, another person, Tom Merihart, took over the job.

On December 27, Merihart asked Brad Meier to help him find some crosshead pins. Meier told Merihart he did not know where they were. That statement raised some questions because Meier had worked in the department about 6 years. Michelle Clark–Ames asked Meier about it. Meier admittedly told Clark–Ames that it was not his job to tell Merihart where the pins were. Clark–Ames responded that it was Meier's job to do so.

Shortly after that, Meier admittedly told Porter that it wasn't his job to tell anyone where parts were. Meier also admitted telling Porter "Fire me if you want to." Respondent did not discharge Meier on this occasion, but management did issue Meier a disciplinary warning.

Brad Meier's second warning resulted from the incident, described above, in which Meier parked in Porter's spot and then became belligerent when told to move his vehicle. The third disciplinary action, Meier's discharge, followed his directing a derisive name and vulgar gesture towards his supervisor.

In each of these incidents, Meier manifested hostility towards his supervisor and in at least two of the instances, Meier demonstrated an unwillingness to follow directions. If management's instructions had been particularly onerous or had subjected Meier to some extraordinary risk, his defiance might be more understandable, but the tasks he had been asked to perform—to help his foreman find a part and to move his vehicle out of the boss's parking spot—were unremarkable. Meier's bellicose reaction was so disproportionate it reasonably could be regarded not merely as insubordinate but scary.

It is not surprising that Respondent has not produced evidence that another employee acted in a similar way and received similar discipline. Meier's volatility lay far outside the norm. Perhaps a large employer, with thousands of workers, would have encountered more than one who reacted with such dramatic hostility to undramatic requests. Respondent, however, is not a large employer.

Respondent did not discharge Meier the first time he displayed hostility, even though Meier told Porter, "Fire me if you want to." Respondent did not discharge Meier the second time. On both occasions, Respondent gave Meier the opportunity to correct his conduct. When Meier displayed the same belligerence the third time, Respondent reasonably could decide that Meier's behavior would not change and that he would continue to defy supervision, sometimes explosively.

For two reasons, Brad Meier's conduct would raise major concerns with virtually any employer. First, he demonstrated a repeated tendency to defy instructions, sometimes in a quite confrontational and offensive manner. It is common sense that no supervisor wishes to deal with an employee who persistently refuses to carry out assignments and shows no inclination to change.

Second, Meier's hair–trigger temper raised significant concerns about workplace safety. He had demonstrated a tendency to become verbally abusive on slight, if any, provocation. Employers commonly would regard such blow–ups as red flags, signaling the possibility of even more serious eruptions in the future.

The record demonstrates that already there had been episodes of violence in Respondent's workplace. Considering that Meier's explosions of temper could be the prodrome of violence, the Respondent would have been quite concerned about retaining him even if he had been adamantly *anti*union.

In sum, I conclude that Respondent would have taken the same action against Brad Meier even in the absence of any protected activity. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 6(c).

Respondent's Objection

After the December 13, 2001 election, Respondent filed a timely objection. Respondent contends that Calvin Lange, Jamie Lange, and Donald Meier engaged in conduct which intimidated employees and thereby tainted the election. Specifically, Respondent points to the "blanket party" statement which Calvin Lange, accompanied by Donald Meier, made to employee John Lyon, and to the after–hours contact which Calvin Lange, Jamie Lange, and Donald Meier had with Lyon on November 23, 2001.

Calvin Lange admitted making the "blanket party" statement but could not pinpoint the date on which he made it. The date must be ascertained as accurately as possible to determine whether the allegedly objectionable conduct took place within the "critical period." If so, the conduct may warrant setting aside the election. If not, the conduct will be considered too remote to have undermined the laboratory conditions which the Board deems essential to a fair election. The "critical period" begins the day the petition was filed, in this case November 14, 2001, and extends through the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

Calvin Lange testified that made the "blanket party" statement to Lyon "way before" he signed a union authorization card, and in "October, I'd say." Lange signed the authorization card on November 2, 2001.

Lyon did not have a clear recollection as to date. On direct examination, he testified that Calvin Lange made the "blanket party" statement to him on about November 12, 2001. At one point on cross–examination, he placed this conversation in October 2001. Even the testimony most favorable to Respondent's case—that Calvin Lange made the "blanket party" threat on November 12, 2001—indicates that this incident took place about 2 days before the Union filed the representation petition. Therefore, the threat did not occur during the critical period and I recommend that the Board overrule the objection.

Even had Lange made the "blanket party" statement to Lyon during the critical period, I still would recommend that the Board overrule the objection. The record does not establish that Lange was acting as the Union's agent when he made this statement. Moreover, it is clear that Respondent never authorized Lange to make such a statement.

Therefore, when Lange made the "blanket party" comment, he was acting as a third party. Ordinarily, statements made by a third party do not carry as much weight as those made by the employer or the Union before an election. Nonetheless, in certain instances third party conduct can be so egregious that it upsets the laboratory conditions necessary to protect employee freedom of choice. See, e.g., *Smithers Tire*, 308 NLRB 72 (1992).

In the present case, Calvin Lange made the blanket party statement to Lyon outside the presence of any other employee except Donald Meier, who had accompanied Lange. Although Lyon reported the incident to Owner Porter, he did not tell other employees about it. Additionally, the "blanket party" statement was an isolated instance. The record does not indicate a pattern of threats.

On the other hand, the election was very close, The tally of ballots recorded 9 votes for and 10 votes against the Union, with four challenged ballots. A threat affecting one voter could have an appreciable impact.

Calvin Lange testified that he was joking, but even were he serious when he told Lyon that he would give Lyon a "blanket party" if Lyon did not vote for the Union, Lange had no way of

knowing for sure how Lyon marked his ballot. The privacy of the voting booth rendered Lange's threat an empty one. Applying an objective standard, I conclude that the "blanket party" statement would not have upset the laboratory conditions even if it had been made during the critical period.

Respondent's Objection does not raise another matter which may have affected the necessary laboratory conditions. However, it merits discussion here. During the critical period, Calvin Lange told employees that Respondent was not going to pay bonuses, as it customarily did at Christmas. This statement was baseless and untrue.

The election took place 12 days before Christmas. A supervisor's statement to employees that they would not be receiving the traditional bonus could easily produce an emotional reaction, particularly if employees were counting on the customary bonuses to pay their Christmas shopping bills.

When Calvin Lange falsely announced that employees would not be receiving Christmas bonuses, he spoke with the apparent authority of the Respondent. Employees would consider him to speak with the voice of management on matters related to their compensation. Employees also would assume that a supervisor's statements about bonuses were knowledgeable and trustworthy. Therefore, Calvin Lange's misrepresentations have at least some potential to taint the election.

Although Respondent's Objection does not mention Lange's misrepresentations about bonuses, that issue may be considered here. Respondent's Objection has opened an inquiry into the validity of the election, that issue remains pending, and the election's results have not been certified. In these circumstances, any conduct which may have degraded the laboratory conditions may be considered. See *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

Nonetheless, I do not recommend that the Board overturn the election because of Lange's inaccurate statements about bonuses. The record establishes that Owner Porter corrected the misinformation by assuring employees they would be getting bonuses.

In sum, I conclude that the record does not establish any objectionable conduct which would warrant setting aside the election.

Maxine Lange's Challenged Ballot

Respondent challenged the ballot of Maxine Lange on the basis that, as a cleaning employee, she was not within the agreed–upon collective–bargaining unit. In a stipulated election agreement approved by the Regional Director on December 13, 2001, the parties agreed that employees in the following appropriate bargaining unit would be eligible to vote:

> All full–time and regular part–time production and maintenance employees employed by the Employer at its plant located at 10 SW 7th Street, Pocahontas, Iowa; EXCLUDING office clerical and office cleaning employees and guards and supervisors as defined in the National Labor Relations Act.

The record establishes that before she suffered an injury in about January 2001, Maxine Lange did some production work along with cleaning duties. After the injury, management directed Lange not to work in the shop but to perform only cleaning duties. Calvin Lange testified that "she just pretty much did all the cleaning and wiped the shelves down and did that stuff."

At the time of the election, Maxine Lange clearly fell within the category of "office cleaning employee." As such, she was excluded from the voting unit. Therefore I recommend that her ballot should not be counted.

Summary of Recommendations in Case 18–RC–16904

For the reasons discussed above, I recommend that the Board take the following actions in Case 18–RC–16904:

The challenge to the ballot cast by Calvin Lange should be sustained because he is a supervisor within the meaning of Section 2(11) of the Act.

The challenges to the ballots of Jamie Lange and Donald Meier Jr. should be overruled, and their ballots counted, because they are not supervisors within the meaning of Section 2(11) of the Act.

The challenge to the ballot of Maxine Lange should be sustained because at the time of the election she was an office cleaning employee and therefore was not included in the agreed–upon voting unit.

After counting the challenged ballots of Jamie Lange and Donald Meier Jr., a revised tally of ballots and the appropriate certification based upon that revised tally of ballots should be issued.

CONCLUSIONS OF LAW

1. Armstrong Machine Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 6, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the following acts: On November 23, 2001, Respondent unlawfully interrogated employees about their union activities [complaint paragraph 5(a)]; unlawfully threatened employees by implying that representation by the Union would be futile and by stating that if employees chose the Union to represent them Respondent would not sign a collective–bargaining agreement and could close the plant [complaint pars. 5(f), 5(g) and 5(h); on about December 12, 2001, Respondent unlawfully interrogated an employee about the employee's union sympathies and threatened to reduce employees' hours because of their union activities [complaint pars. 5(q) and 5(r)]; on about December 24, 2001, Respondent unlawfully discharged employees Jamie Lange and Donald Meier, Jr. and has thereafter refused to reinstate them.

4. Respondent violated Section 8(a)(3) of the Act on December 24, 2001 by discharging employees Jamie Lange and Donald Meier, Jr. and thereafter by refusing to reinstate them.

5. Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

[1] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be

ORDER

The Respondent, Armstrong Machine Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities or the union activities of other employees; threatening employees that choosing a union would be futile, that Respondent would not sign a collective–bargaining agreement with a union selected by its employees, and that Respondent could close the plant should employees select a union to represent them.

(b) Discharging or otherwise discriminating against employees because they joined, formed or assisted a labor organization or engaged in concerted activities for their mutual aid and protection, or to discourage other employees from engaging in such union and/or protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Offer immediate and full reinstatement to employees Jamie Lange and Donald Meier, Jr., and make them whole, with interest, for all losses they suffered because of Respondent's unlawful discrimination against them.

(b) Within 14 days after service by the Region, post at its facilities in Pocahontas, Iowa, copies of the attached notice marked "Appendix A."[2] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 23, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. December 16, 2004

adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT interrogate employees about their union or other protected activities or about the union or protected activities of other employees.

WE WILL NOT threaten employees by stating that choosing a union to represent them is futile and that we will not sign a collective–bargaining agreement with a union they select.

WE WILL NOT threaten employees by stating that we could close our plant if they choose a union to represent them.

WE WILL NOT discharge employees because they engaged in union activities or other protected, concerted activities, or to discourage other employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jamie Lange and Donald Meier Jr. immediate and full reinstatement to their former positions or to substantially equivalent positions if their former positions are not longer available.

WE WILL make Jamie Lange and Donald Meier Jr. whole, with interest, for all losses they suffered because of our unlawful discrimination against them.

ARMSTRONG EQUIPMENT COMPANY